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ANCIENT MEXICAN JURISPRUDENCE.

The reader may be startled by the title of this article, and ask, with unfeigned skepticism, if the subjects of Montezuma enjoyed institutions from which any lessons may be extracted for the benefit of other ages? He will be astonished to learn that, "as honey was gathered from the carcass of dead and rotten greatness," so in the customs and laws of this decayed people may be found the recognition of principles of the highest import to the welfare and happiness of a nation. The fanciful learning of Sir William Jones has traced the trial by jury to the banks of Ilyssus and the very shades of the Academy; and, though the lawyer may not discern there the vivid type of the Saxon institution, which allures the judgment of the scholar, yet he cannot fail to be gratified by the parallel which is afforded. Perhaps there is no aspect, under which law assumes more the character of a science, than when it is illustrated by a comparison with the systems of other countries and ages. *Comparative jurisprudence* is a study full of interest and instruction. As there are certain principles of motion, and elements of physical strength which seem common to all animals, so there are great principles of justice and rules of government which we discern in institutions widely various in character, as in time. And is it not one of the most agreeable privileges of the accomplished jurist, ascending above the heavy atmosphere of the statute book, the record of local laws, to observe far away, as the veil of obscurity is removed from the widening horizon, the signs that other countries

and other ages bear testimony to the living elements of our own jurisprudence?

In the ancient personification of justice, the goddess is represented as blind, that the wandering eyes may not rest upon anything to disturb the even balance of the scales which she holds aloft. In the spirit of this figure, it has been a favorite object with all civilized nations to secure the independence of the judiciary, and to guard it, so far as possible, from all external influences. This has been done by careful provisions of the constitutions of the United States and of Massachusetts. The laws of England enjoy the same principle, though it was only as late as the reign of George III. that it was established in its full extent. It is a striking testimony to the intrinsic importance of this principle, that it was recognised by the ancient Mexicans, who rendered their superior judges wholly independent of the crown, and secured them a maintenance from the produce of a part of the lands of the state reserved for this purpose. The historian adds, that no one of the Mexican monarchs is accused of an attempt to violate this principle — not even the lordly Montezuma, the rays of whose power smote with dread the most distant regions of his empire. From the Indian sovereign the legislature of Massachusetts may receive a lesson of justice.

The ancient laws of Mexico recognised slavery. But though they halted far behind the benign principles of the common law, which proclaims freedom to the slave, they were in advance of the *legislation* of our country on this important subject. The slave was allowed to have his own family, to hold property, and even other slaves. His children were free. No one could be born to slavery in Mexico; an honorable distinction, the historian adds, not known in any civilized community where slavery has been sanctioned.

It was a capital offence to remove the boundaries of another's lands. The words of Deuteronomy were pronounced by the ancient Mexican laws — "Cursed be he that removeth his neighbor's landmark; and all the people shall say, Amen." And the same reason probably lay at the foundation of this injunction in Mexico as in Judea. As the principles of surveying were not understood, the boundaries of lands were necessarily designated by certain marks, the removal of which would be the cause of incalculable confusion. The classics of antiquity, in harmony with Holy Writ, regard these as sacred, and record the honors and sacrifices with which they were distinguished. The huge stone, such as scarce six men of our degenerate days could lift, hurled

with superhuman strength by Turnus, was an ancient landmark. In describing it Virgil has done little more than copy Homer.

——————— saxum circumspicit ingens,
Saxum antiquum, ingens, *campo quod fortè jácebat,*
Limes agro positus, litem ut discerneret arvis.

But we hasten to embody in our pages the interesting sketch of the ancient Mexican jurisprudence, for which we are indebted to Mr. Prescott's admirable History of the Conquest of Mexico.[1]

If there are any of our readers not already familiar with this work, they may be surprised that it should afford topics of interest to the student of jurisprudence. Indeed, there is more than one discussion in its pages, appealing to the judgment of the lawyer, so that we should be justified by the practice of certain courts — which having cognizance of some matters for a particular purpose, proceed to dispose of the whole case — even if we took jurisdiction of the whole work. This would be fortified by the personal character of the author, whom the bar may claim as a brother, and by the name which he bears, never to be mentioned in our courts without a homage of respect and affection. But, though the author might not except to our jurisdiction, we fear that our judgment would receive little consideration.

In less than a month from the time of its publication in our country, this work has been welcomed among the classics of our literature; and not without reason. It is a beautiful production, rich with the spoils of various learning, free and elegant in its composition, elevated and humane in its character, at the same time that it is lively and refined, with a style uniformly clear, at times warm and glowing, the whole wrought with unsurpassed care and skill. A mass of authorities has been examined, such as might astonish the lawyer, accustomed to the exhausting researches of his profession. This is nowhere more apparent than in the Preliminary View of the Ancient Mexican Civilization, from which we make our extract.

The discussion of the *right of conquest*, with which Mr. Prescott has relieved the narrative of the chilling massacre at Cholula (Vol. II. p. 30) will have an interest for professional readers. It will be curious to compare the treatment of this question in the pages of

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[1] History of the Conquest of Mexico, with a Preliminary View of the Ancient Mexican Civilization, and the Life of the Conqueror, Hernando Cortes. By William H. Prescott, author of the "History of Ferdinand and Isabella."

"Victrices aquilas alium laturus in orbem."
LUCAN, Pharsalia, lib. v. v. 238.

In three volumes. New York, Harper & Brothers, 1843.

the historian, in the Commentaries of Mr. Justice Story,[1] and in the judicial opinion of Chief Justice Marshall.[2]

The legislative power, both in Mexico and Tezcuco, resided wholly with the monarch. This feature of despotism, however, was, in some measure, counteracted by the constitution of the judicial tribunals, — of more importance, among a rude people, than the legislative, since it is easier to make good laws for such a community, than to enforce them, and the best laws, badly administered, are but a mockery. Over each of the principal cities, with its dependent territories, was placed a supreme judge, appointed by the crown, with original and final jurisdiction in both civil and criminal cases. There was no appeal from his sentence to any other tribunal, not even to the king. He held his office during life; and any one, who usurped his ensigns, was punished with death.[3]

Below this magistrate was a court, established in each province, and consisting of three members. It held concurrent jurisdiction with the supreme judge in civil suits, but, in criminal, an appeal lay to his tribunal. Besides these courts, there was a body of inferior magistrates, distributed through the country, chosen by the people themselves in their several districts. Their authority was limited to smaller causes, while the more important were carried up to the higher courts. There was still another class of subordinate officers, appointed also by the people, each of whom was to watch over the conduct of a certain number of families, and report any disorder or breach of the laws to the higher authorities.[4]

In Tezcuco the judicial arrangements were of a more refined character;[5] and a gradation of tribunals finally terminated in a general meeting or parliament, consisting of all the judges, great and petty, throughout the kingdom, held every eighty days in the capital, over which the king presided in person. This body determined all suits, which, from their importance, or difficulty, had been reserved for its consideration by the lower tribunals. It served, moreover, as a council of state, to assist the monarch in the transaction of public business.[6]

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[1] 1 Commentaries on Constitution of U. S., 4.

[2] Johnson *v.* M'Intosh, (8 Wheat. R. 574 — 588.)

[3] This magistrate, who was called *cihuacoatl*, was also to audit the accounts of the collectors of the taxes in his district. (Clavigero, Stor. del Messico, tom. II. p. 127. — Torquemada, Monarch. Ind., lib. 11, cap. 25.) The Mendoza Collection contains a painting of the courts of justice, under Montezuma, who introduced great changes in them. (Antiq. of Mexico, vol. I., Plate 70.) According to the interpreter, an appeal lay from them, in certain cases, to the king's council. Ibid., vol. VI. p. 79.

[4] Clavigero, Stor. del Messico, tom. II. pp. 127, 128. — Torquemada, Monarch. Ind., ubi supra.

In this arrangement of the more humble magistrates we are reminded of the Anglo-Saxon hundreds and tithings, especially the latter, the members of which were to watch over the conduct of the families in their districts, and bring the offenders to justice. The hard penalty of mutual responsibility was not known to the Mexicans.

[5] Zurita, so temperate, usually, in his language, remarks, that, in the capital, "Tribunals were instituted which might compare in their organization with the royal audiences of Castile." (Rapport, p. 93.) His observations are chiefly drawn from the Tezcucan courts, which, in their forms of procedure, he says, were like the Aztec. (Loc. cit.)

[6] Borturini, Idea, p. 87. Torquemada, Monarch. Ind., lib. 11, cap. 26.

Zurita compares this body to the Castilian córtes. It would seem, however, according to him, to have consisted only of twelve principal judges, besides the king. His meaning is somewhat doubtful. (Rapport, pp. 94, 101, 106.) M. de Humboldt, in his account of the

Such are the vague and imperfect notices that can be gleaned, respecting the Aztec tribunals, from the hieroglyphical paintings still preserved, and from the most accredited Spanish writers. These, being usually ecclesiastics, have taken much less interest in this subject, than in matters connected with religion. They find some apology, certainly, in the early destruction of most of the Indian paintings, from which their information was, in part, to be gathered.

On the whole, however, it must be inferred, that the Aztecs were sufficiently civilized to evince a solicitude for the rights both of property and of persons. The law, authorizing an appeal to the highest judicature in criminal matters only, shows an attention to personal security, rendered the more obligatory by the extreme severity of their penal code, which would naturally have made them more cautious of a wrong conviction. The existence of a number of coördinate tribunals, without a central one of supreme authority to control the whole, must have given rise to very discordant interpretations of the law in different districts. But this is an evil which they shared in common with most of the nations of Europe.

The provision for making the superior judges wholly independent of the crown was worthy of an enlightened people. It presented the strongest barrier, that a mere constitution could afford, against tyranny. It is not, indeed, to be supposed, that, in a government otherwise so despotic, means could not be found for influencing the magistrate. But it was a great step to fence round his authority with the sanction of the law; and no one of the Aztec monarchs, as far as I know, is accused of an attempt to violate it.

To receive presents or a bribe, to be guilty of collusion in any way with a suitor, was punished, in a judge, with death. Who, or what tribunal, decided as to his guilt, does not appear. In Tezcuco this was done by the rest of the court. But the king presided over that body. The Tezcucan prince, Nezahualpilli, who rarely tempered justice with mercy, put one judge to death for taking a bribe, and another for determining suits in his own house, — a capital offence, also, by law.[1]

The judges of the higher tribunals were maintained from the produce of a part of the crown lands, reserved for this purpose. They, as well as the supreme judge, held their offices for life. The proceedings in the courts were conducted with decency and order. The judges wore an appropriate dress, and attended to business both parts of the day, dining, always, for the sake of despatch, in an apartment of the same building where they held their session; a method of proceeding much commended by the Spanish chroniclers, to whom despatch was not very familiar in their own tribunals. Officers attended to preserve order, and others summoned the parties, and produced them in court. No counsel was employed; the parties stated their own case, and supported it by their witnesses. The oath of the accused was also admitted in evidence. The statement of the case, the testimony, and the proceedings of the trial, were all set forth by a clerk, in hieroglyphical paintings, and handed over to the court. The paintings were executed with so much accuracy, that, in all suits respecting real property,

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Aztec courts, has confounded them with the Tezcucan. Comp. Vues des Cordillères et Monumens des Peuples Indigènes de l'Amérique, (Paris, 1810,) p. 55, and Clavigero, Stor. del Messico, tom. II. pp. 128, 129.

[1] "Ah! si esta se repitiera hoy, que bueno seria!" exclaims Sahagun's Mexican editor. Hist. de Nueva España, tom. II. p. 304, nota. — Zurita, Rapport, p. 102. — Torquemada, Monarch. Ind., ubi supra. — Ixtlilxochitl, Hist. Chich., MS., cap. 67.

they were allowed to be produced as good authority in the Spanish tribunals, very long after the Conquest; and a chair for their study and interpretation was established in Mexico in 1553, which has long since shared the fate of most other provisions for learning in that unfortunate country.[1]

A capital sentence was indicated by a line traced with an arrow across the portrait of the accused. In Tezcuco, where the king presided in the court, this, according to the national chronicler, was done with extraordinary parade. His description, which is of rather a poetical cast, I give in his own words. "In the royal palace of Tezcuco was a court-yard, on the opposite sides of which were two halls of justice. In the principal one, called 'the tribunal of God,' was a throne of pure gold, inlaid with turquoises and other precious stones. On a stool, in front, was placed a human skull, crowned with an immense emerald, of a pyramidal form, and surmounted by an aigrette of brilliant plumes and precious stones. The skull was laid on a heap of military weapons, shields, quivers, bows, and arrows. The walls were hung with tapestry, made of the hair of different wild animals, of rich and various colors, festooned by gold rings, and embroidered with figures of birds and flowers. Above the throne was a canopy of variegated plumage, from the centre of which shot forth resplendent rays of gold and jewels. The other tribunal, called 'the King's,' was also surmounted by a gorgeous canopy of feathers, on which were emblazoned the royal arms. Here the sovereign gave public audience, and communicated his despatches. But, when he decided important causes, or confirmed a capital sentence, he passed to the 'tribunal of God,' attended by the fourteen great lords of the realm, marshalled according to their rank. Then, putting on his mitred crown, incrusted with precious stones, and holding a golden arrow, by way of sceptre, in his left hand, he laid his right upon the skull, and pronounced judgment."[2] All this looks rather fine for a court of justice, it must be owned. But it is certain, that the Tezcucans, as we shall see hereafter, possessed both the materials, and the skill requisite to work them up in this manner. Had they been a little further advanced in refinement, one might well doubt their having the bad taste to do so.

The laws of the Aztecs were registered, and exhibited to the people, in their hieroglyphical paintings. Much the larger part of them, as in every nation imperfectly civilized, relates rather to the security of persons, than of property. The great crimes against society were all made capital. Even the murder of a slave was punished with death. Adulterers, as among the Jews, were stoned to death. Thieving, according to the degree of the offence, was punished by slavery or death. Yet the Mexicans could have been under no great apprehension of this crime, since the entrances to their dwellings were not secured by bolts, or fastenings of any kind. It was a capital offence to remove the boundaries of another's lands; to alter the established measures; and for a guardian not to be able to give a good account of his ward's property. These regulations evince a regard for equity in dealings, and for private rights, which argues a considerable progress in civilization. Prodigals, who squandered their patrimony, were punished in like

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[1] Zurita, Rapport, pp. 95, 100, 103. — Sahagun, Hist. de Nueva España, loc. cit. — Humboldt, Vues des Cordillères, pp. 55, 56. — Torquemada, Monarch. Ind., lib. 11, cap. 25.

Clavigero says, the accused might free himself by oath; "Il reo poteva purgarsi col giuramento." (Stor. del Messico, tom. II. p. 129.) What rogue, then, could ever have been convicted!

[2] Ixtlilxochitl, Hist. Chich., MS., cap. 36.

These various objects had a symbolical meaning, according to Boturini, Idea, p. 84.

manner; a severe sentence, since the crime brought its adequate punishment along with it. Intemperance, which was the burden, moreover, of their religious homilies, was visited with the severest penalties; as if they had foreseen in it the consuming canker of their own, as well as of the other Indian races in later times. It was punished in the young with death, and in older persons with loss of rank and confiscation of property. Yet a decent conviviality was not meant to be proscribed at their festivals, and they possessed the means of indulging it, in a mild fermented liquor, called *pulque*, which is still popular, not only with the Indian, but the European population of the country.[1]

The rites of marriage were celebrated with as much formality as in any Christian country; and the institution was held in such reverence, that a tribunal was instituted for the sole purpose of determining questions relating to it. Divorces could not be obtained, until authorized by a sentence of this court, after a patient hearing of the parties.

But the most remarkable part of the Aztec code was that relating to slavery. There were several descriptions of slaves: prisoners taken in war, who were almost always reserved for the dreadful doom of sacrifice; criminals, public debtors, persons who, from extreme poverty, voluntarily resigned their freedom, and children who were sold by their own parents. In the last instance, usually occasioned also by poverty, it was common for the parents, with the master's consent, to substitute others of their children successively, as they grew up; thus distributing the burden, as equally as possible, among the different members of the family. The willingness of freemen to incur the penalties of this condition is explained by the mild form in which it existed. The contract of sale was executed in the presence of at least four witnesses. The services to be exacted were limited with great precision. The slave was allowed to have his own family, to hold property, and even other slaves. His children were free. No one could be born to slavery in Mexico;[2] an honorable distinction, not known, I believe, in any civilized community where slavery has been sanctioned.[3] Slaves were not sold by their masters, unless when these were driven to it by poverty. They were often liberated by them at their death, and sometimes, as there was no natural repugnance founded on difference of blood and race, were married to them. Yet

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[1] Paintings of the Mendoza Collection, Pl. 72, and Interpretation, ap. Antiq. of Mexico, vol. VI. p. 87. — Torquemada, Monarch. Ind., lib. 12, cap. 7. — Clavigero, Stor. del Messico, tom. II. pp. 130–134. — Camargo, Hist. de Tlascala, MS.

They could scarcely have been an intemperate people, with these heavy penalties hanging over them. Indeed, Zurita bears testimony that those Spaniards, who thought they were, greatly erred. (Rapport, p. 112.) Mons. Ternaux's translation of a passage of the Anonymous Conqueror, "aucun peuple n'est aussi sobre," (Recueil de Pièces Relatives à la Conquê du Mexique, ap. Voyages, &c., (Paris, 1838,) p. 54,) may give a more favorable impression, however, than that intended by his original, whose remark is confined to abstemiousness in eating. See the Relatione, ap. Ramusio, Raccolta delle Navigationi et Viaggi. (Venetia, 1554–1565.)

[2] In Ancient Egypt, the child of a slave was born free, if the father were free. (Diodorus, Bibl. Hist., lib. 1, sec. 80.) This, though more liberal than the code of most countries, fell short of the Mexican.

[3] In Egypt the same penalty was attached to the murder of a slave, as to that of a freeman. (Ibid., lib. 1, sec. 77.) Robertson speaks of a class of slaves held so cheap in the eye of the Mexican law, that one might kill them with impunity. (History of America, (ed. London, 1776,) vol. III. p. 164.) This, however, was not in Mexico, but in Nicaragua, (see his own authority, Herrera, Hist. General, dec. 3, lib. 4, cap. 2,) a distant country, not incorporated in the Mexican empire, and with laws and institutions very different from those of the latter.

a refractory or vicious slave might be led into the market, with a collar round his neck, which intimated his bad character, and there be publicly sold, and, on a second sale, reserved for sacrifice.[1]

Such are some of the most striking features of the Aztec code, to which the Tezcucan bore great resemblance.[2] With some exceptions, it is stamped with the severity, the ferocity, indeed, of a rude people, hardened by familiarity with scenes of blood, and relying on physical, instead of moral means, for the correction of evil.[3] Still, it evinces a profound respect for the great principles of morality, and as clear a perception of these principles as is to be found in the most cultivated nations.

Recent American Decisions.

Circuit Court of the United States, Massachusetts, October, 1843, *at Boston. In Bankruptcy.*

In the Matter of Edward and William H. McLellan.

A bill of sale of one half of a vessel, as collateral security for a debt, with a provision that the vendors may keep possession of the vessel, and use her for their own benefit, until default of payment, is valid, as an immediate conditional sale.

Delivery of possession, to a purchaser, of a moiety of a vessel, when in the possession of the other part owner, is not, in general, indispensable.

As between the vendor and vendee, notice to the part owner in possession is not necessary.

By the Revised Statutes of Massachusetts, it is not necessary, as between the parties themselves, that a mortgage of personal property should be recorded.

The assignee in bankruptcy, except in cases of fraud, stands in no better situation than the bankrupts themselves.

The fact that one of the vendors made oath at the custom-house, subsequent to the bill of sale, that the vessel belonged to him and his partner, cannot affect the rights of the vendee.

The bankrupts, some months previous to their bankruptcy, conveyed by a bill of sale, as collateral security to a debt of $2,000, one half of a vessel, of which the other half was owned by the master, and agreed to assign all future poli-

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[1] Torquemada, Monarch. Ind., lib. 12, cap. 15; lib. 14, cap. 16, 17. — Sahagun, Hist. de Nueva España, lib. 8, cap. 14. — Clavigero, Stor. del Messico, tom. II. pp. 134-136.

[2] Ixtlilxochitl, Hist. Chich., MS., cap. 38, and Relaciones, MS.

The Tezcucan code, indeed, as digested under the great Nezahualcoyotl, formed the basis of the Mexican, in the latter days of the empire. Zurita, Rapport, p. 95.

[3] In this, at least, they did not resemble the Romans; of whom their countrymen could boast, "Gloriari licet, nulli gentium mitiores placuisse pœnas." Livy, Hist., lib. 1, cap. 28.

cies of insurance thereon, as further security for the same debt, which was done; it being agreed that the vendors might use the vessel for their own benefit, until default of payment. The bill of sale was not recorded. The vessel, at the time the bill of sale was made, was at sea, in the possession of the master. Between that time, and the filing of the petition for the benefit of the bankrupt law, by the vendors, the vessel came once to Boston, the place of business and residence of the vendors, and twice to Bath, the place of business and residence of the master, but the vendees did not take possession. Five days before the filing of the petition, they sent notice to the master of the bill of sale. The said moiety of the vessel having been sold, by direction of the assignee, it was *held*, that the proceeds should be paid to the vendees.

This was the case of a question adjourned into the circuit court from the district court of Massachusetts. The petition set forth that Edward and William H. McLellan, of Boston, merchants and copartners, of whom the petitioner, Henry Winsor, of Boston, was the assignee in bankruptcy, included in the schedule of their assets one half of the brig Napoleon, at sea; and in the schedule of their liabilities, $2,000 due to the trustees of Mrs. Rebecca S. McLellan, secured by a bill of sale of one half of the brig Napoleon. The bill of sale was made December 9, 1841, and the petition of the McLellans for the benefit of the bankrupt law was filed November 22, 1842. In the intermediate time the trustees did not take possession of the vessel, but the bankrupts employed her for their own use. And on April 28, 1842, Edward McLellan made oath at the custom-house, that he and his partner, and George W. Jordan were the owners of the brig. Jordan was the master of the vessel, and owned one moiety.

The trustees, on April 8, 1843, petitioned the court for leave to sell the half of the brig which had been conveyed to them, and the sale was authorized to be made under the direction of the assignee. The sale took place, and the trustees executed a conveyance, but the collector refused to issue a new register, unless upon a transfer by the assignee. The assignee accordingly executed a bill of sale to the purchasers, and received the purchase money, amounting to $1,600, which sum was subject to deduction, for payments and charges, of $133 59. The balance was claimed by the assignee to be paid into the general fund, for the benefit of the creditors.

The answer of the trustees, in addition to the above facts, set forth that the policies of insurance, made upon the said moiety, subsequent to the bill of sale, had been transferred and made payable to them, and that it was agreed, at the time the bill of sale was given, that the bankrupts should use the vessel, until default of payment. The vessel, at that time, was at sea, but, between

that time and the time of filing the petition for the benefit of the bankrupt law, it had been once at Boston, and twice at Bath, where the master lived. The trustees did not take possession, but, on the 17th of November, 1842, they addressed a letter to the master, notifying him of the transfer to them, and, subsequently to the receipt of that letter, the vessel was managed for the joint use of the trustees and the master. The answer concluded with a prayer, that the assignee be ordered to pay over to them the balance of the proceeds in his hands, and for costs.

Upon these facts, the question was adjourned into the circuit court.

Willam Gray for the petitioner.

Sidney Bartlett for the respondents.

Story J. In considering the present question, it should be constantly borne in mind, that there is no provision in our Bankrupt Act of 1841, ch. 9, corresponding with the provision in the statute of 21 Jac. I., ch. 19, § 10, § 11; and the more recent statutes of England, respecting reputed ownership in cases of bankruptcy.[1] There is no proof, nor even any allegation of fraud between the trustees and the bankrupts with a view to delay or defeat or defraud their creditors in the present transaction. So that the case stands drily and nakedly upon the same rights of the assignee acting for the general creditors, under a general assignment in bankruptcy. Now the principle has been long established, that the assignee in bankruptcy does not stand in the position of a purchaser, nor even in so favorable a position as an individual creditor may stand.[2] The assignee in bankruptcy takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities which exist against the same in the hands of the bankrupt. This was clearly laid down by Lord Hardwicke in *Brown* v. *Heathcote* (1 Atk. 160, 162,) and has ever since been adhered to, not only in courts of equity, but also, as the case of *Leslie* v. *Guthrie*, (1 Bing. New Cas. 697,) abundantly shows, at law. But I need not dwell upon this point, as it came very fully under consideration in the case of *Rand, assignee*, v. *Winslow*, at the last October term of the circuit court in Maine.

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[1] See Statute of 6 Geo. IV. ch. 16, § 72.

[2] 2 Story Eq. Jurisp. § 1228, § 1229, § 1411; Langton *v.* Horton, 1 Hare R. 547, 563; Muir *v.* Schenck, 3 Hill R. 228; Murray *v.* Lylburn, 2 John. Ch. R. 441, 443; Deacon on Bank. ch. 10, § 3, p. 320, 321, edit. 1827.

It appears, from the facts disclosed by the petition and answer, that in July, 1841, the trustees had in their possession $2,000 of trust money belonging to the *cestui que trust*, Mrs. S. M. McLellan, the wife of one of the bankrupts; and that they lent that sum to the firm of E. and W. H. McLellan, (the bankrupts); and on the 9th of December, 1841, upon a settlement with the firm, they took an accountable receipt from the firm for the payment of that sum, and interest on demand; and at the same time they took, as collateral security, a bill of sale of the one half of the brig Napoleon, then at sea, the one half being owned by the firm, and the other half being owned by one Jordan, who was then master thereof; and it was at the same time agreed, that the policy, then existing on the one half of the brig on behalf of the firm, should be assigned to the trustees, and also all policies on her future voyages, as collateral security for the same purposes. Assignments were accordingly made on the respective policies. No notice was given to the master, of the bill of sale, by the trustees or otherwise, until the 17th of November, 1842, when a letter was written to him by the trustees, informing him of the fact, the brig then being abroad. Up to this period the firm had the possession and use of the brig in common with the master, and received the profits and earnings thereof; and the brig having returned once to Boston, (the place of residence and business of the firm,) and twice to Bath, the place of residence and business of the master. The firm petitioned for the benefit of the bankrupt act, on the 22d of November, 1841, (five days only after the letter was written) and were duly declared bankrupts on the 3d of January, 1843.

It is under these circumstances, that the assignee, on behalf of the general creditors, insists that the want of delivery to, and possession by the trustees, is fatal to their claim, and that no property passed to them under the bill of sale made by the bankrupts to the trustees, one of the trustees being one of the bankrupts. In the petition, there is no allegation that the bill of sale was made to the trustees in contemplation of bankruptcy, and therefore that question, as well the question, whether the conveyance was intentionally fraudulent, might properly be laid aside, as not belonging either to the allegations or proofs in the statements of the parties. I shall, nevertheless, take occasion to speak a few words to the point, as if it were properly presented by the proceedings before the court.

The first objection to the conveyance, taken by the petitioner, is that, (as has been already suggested,) there was no delivery or possession of the brig, made or taken by the trustees; nor indeed any

notice of the transfer given to the master until five days before the bankruptcy, so that, in point of fact, during all the intermediate period between the conveyance and the notice, the grantors had the full possession and use of the brig and of her profits. Now, in the first place, it is clear that there can be no delivery of possession of a ship by one part-owner, of his share, to a purchaser, when the actual possession is in another part-owner, such, for instance, as in the present case, where the master is owner of a moiety of the vessel, and in actual possession thereof. The most that can, under such circumstances, be required is, that the master or other part-owners, should have notice of the transfer, so to put them in a correct position so far as their own rights are concerned. That actual possession by a purchaser of the share of a part-owner is not indispensable, at least in ordinary cases, is clearly established in *Addis* v. *Baker*, (1 Anst. R. 222); and was affirmed in the case of a mortgage of an undivided share of a ship, in the case of *Gillespie* v. *Coutts*, (Ambler R. 652.[1]) In the next place, however the case may be as to a subsequent purchaser without notice, or to a creditor claiming by judgment and execution, — where no possession is given by the part-owner, or notice of the transfer given to the other part-owners in possession, (which may require the application of a different principle,) — it is clear, that as between the parties themselves to the transfer, the conveyance will pass a complete and effectual title, independent of the delivery of any possession. This is a known and old rule, applicable to the sale of all personal chattels.[2] In cases of bankruptcy, independently of fraud, as we have already seen, the assignee can take only what the bankrupt himself could lawfully hold; and he succeeds merely to that title, and nothing more. Nay, even in cases of reputed ownership in bankruptcy, under the provision of the statute of 21 Jac. I. ch. 19, §10, §11, the omission of mortgagees to take possession of a ship for nine months after the transfer to them, and leaving the ship in the intermediate time in the possession and management of the mortgagors, has been held not to affect the title of the mortgagees as against the assignees in bankruptcy; the mortgagees having, in fact, taken possession before the bankruptcy of the mortgagors; for the court said, that the ship could not be treated as within the order and disposition of the mortgagors at the time of their bankruptcy. Lord Chief Justice Abbott, on that occasion, added,

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[1] See also Abbott on Ship. by Lee, part 1, ch. 1, § 3, edit. 1840. 3 Kent's Comm. Lect. 45, p. 132.

[2] See 2 Black. Comm. 448.

"The bill of sale might be void, upon the statute of Elizabeth, as against creditors, but not as against the parties who executed it; and their assignees are, in this respect, in no better situation." [1] The case of *Briggs* v. *Parkman*, (2 Metcalf's R. 258,) is a very strong authority to show that the omission to take possession of the mortgaged premises, being personal property, and agreeing that, until condition broken, the mortgagor may retain the possession and use thereof — nay, even may sell and dispose thereof, substituting other property as security, are not to be deemed, *per se*, acts of fraud upon creditors; but the presumption of fraud may be repelled, and the conveyance held good against the general assignees under the Insolvent Act of 1838, ch. 163.

But it is further objected, that notwithstanding the formal bill of sale to the trustees, yet, taking the other papers, the receipt given by the trustees, and the order on the policies, it was not the intention of the parties that the title should pass to the trustees, but that the bill of sale and order were to be held as collateral security, and, on repayment of the debt, the "bill of sale and order for insurance shall be returned to the owners, and be null and void." It strikes me that this is a very forced and unnatural construction of the proceedings of the parties. The manifest object of the parties was to give collateral security to the trustees, by way of mortgage, on the vessel itself and on the policies underwritten thereon, and not merely for them to hold the bill of sale as a formal instrument by way of pledge, without giving effect to it as a conditional transfer of the property. The permission of the owners to take the profits and earnings of the vessel in the intermediate time, and until the debt was to be paid, was not inconsistent with, but in pursuance of the original agreement. The policies were underwritten exactly as they should be, in the name of the mortgagors, who were the general owners, subject only to the rights of the mortgagees. The subsequent change of the papers by Edward McLellan, without the consent or knowledge of the trustees, could not change their rights, even if he intended thereby to affect them, of which there is not any evidence. In short, it appears to me, that no other sensible construction can be put upon the original transaction, but to treat it as an immediate conditional sale of the moiety of the vessel to the trustees, as collateral security for the debt due to them.

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[1] Robinson *v.* McDonnell, (2 Barn. & Ald. R. 134, 136). See also the remarks of Mr. Justice Bayley in the same case.

But then it is said, that if the bill of sale is not deemed, with the accompanying papers, to have created a mortgage, (as I think it clearly did,) then, it is void, because it was not recorded, as required by the Revised Statutes of Massachusetts, ch. 74, § 5. That section provides, "that no mortgage of personal property, hereafter made, shall be valid against any other person *than the parties thereto*, unless possession of the mortgaged property be delivered to, and retained by the mortgagee, or unless the mortgage be recorded by the clerk of the town where the mortgagor resides." It may well admit of doubt, whether the statute was intended to apply to any cases of mortgages of undivided interests in personal property, of which, of course, no exclusive possession could be given to, or retained by the mortgagee. But, assuming it to be otherwise, still the statute expressly holds such unrecorded mortgages to be valid between the parties; and the assignees in bankruptcy, as we have already seen, except in cases of fraud, take only what the bankrupt himself is entitled to.

But then, again, it is urged, that the transaction is void under the second section of the Bankrupt Act of 1841, ch. 9, as a conveyance made in contemplation of bankruptcy, and for the purpose of giving the trustees an undue preference as creditors. Now, this argument is mainly, if not wholly, founded upon the ground, that the conveyance is not to be treated as a sale or conveyance of the moiety of the vessel to the trustees, until the 17th of November, 1842, only five days before the bankruptcy, when they gave notice to the master of the brig of their title; which notice, however, as the brig was then abroad, did not reach the master until long afterwards. But it appears to me that the foundation on which the argument rests, utterly fails; for in the view which I take of the matter, the bill of sale took effect as a mortgage at the time of the execution and delivery thereof to the trustee on the 9th of December, 1841. At that time there is no pretence to say that either the mortgagors or the trustees contemplated any bankruptcy of the mortgagors. The notice to the master was not necessary, to found a title in the trustees; but it was at most only an assertion of their title, necessary to be made for the protection of the master, and for the protection of the trustees against any subsequent bona fide purchaser or judgment creditor. The notice took effect from the time it was sent to the master; and the time when it reached him is not material, so far at least as the present assignee is concerned. The only remaining consideration, under any aspect of the case, would be as to the conveyance being founded in a positive, actual fraud upon the creditors of the bank-

rupt. But this, upon the facts stated in the case, cannot be either inferred or presumed; and indeed, as has been already suggested, no question arises under the petition and answer in the present case, either as to the conveyance having been made in contemplation of bankruptcy, or with an intent to defraud the creditors of the bankrupt.

Upon the whole, I shall direct it to be certified to the district court, upon the question adjourned into this court, that upon the facts set forth in the said petition and answer, the said one half of the said brig Napoleon, after the said Edward and William H. McLellan were decreed bankrupts, was the property of and should be holden by the said trustees, for the benefit of the said Rebecca McLellan, and that it was not the property of, or to be holden by the said assignee for the benefit of the creditors of the estate of the said bankrupts.

Supreme Court of Pennsylvania, September Term, 1843.

ECKERT, ADMINISTRATOR OF JOHNSON, *v.* LINES AND SCOTT.

An over-supply of an infant's wants, though the goods might, in other respects, be ranked as necessaries, gives a demand against him only for so much as was actually needed; and it is the tradesman's duty to acquaint himself with the infant's necessities and circumstances, as well as to take notice of supplies by other tradesmen.

The rule that no one may deal with an infant, is subject to the exception that a stranger may supply him with necessaries; but to bring the contract within the exception, the burden of proving the existence of an actual necessity, rests on the tradesman who, in regard to it, deals at his peril.

Though the permission of a guardian may excuse the unfitness of a supply in a doubtful case in respect to the infant's degree, yet no permission to deal for what is manifestly improper in quantity or sort, can subject the infant to liability in favor of one who has dealt with him *mala fide;* but the guardian may make himself personally liable by a permission which amounts to an order.

What are necessaries, is a question mixed of fact and law; but where a supply has been so grossly excessive as to shock the senses, the court may declare it to be inordinate as matter of law.

THIS was an action of assumpsit in the common pleas of Washington county. The declaration contained the common money counts; to which the defendant pleaded that the intestate was an infant at the time of the supposed promises; and the plaintiffs replied that the goods provided were necessaries. The intestate, it appeared, contracted a debt with the plaintiffs for goods sold and

moneys advanced between the 9th of October, 1836, and the 30th of January, 1838, to the amount of 1063 dollars and 27 cents. The items of the account showed a supply of fancy goods and expensive clothes — such as a reckless boy, uncontrolled by a parent or guardian, would be apt to purchase. The intestate had a guardian; but it did not appear that he had exercised any control or care over him, or that he had been consulted in relation to his dealings. The defendant prayed the president of the court to charge "that the plaintiffs had no right to deal with the minor even for necessaries, unless the guardian refused to furnish him with them;" but the president charged "that the plaintiffs had no right to deal with the deceased, unless by the *permission*, express or implied, of the guardian; *or* unless the guardian refused to furnish necessaries for his ward." Again, the defendant prayed direction, "that if the plaintiffs were justifiable in dealing with him, their bill is so exorbitant that the plaintiffs themselves could not have considered them necessaries, and therefore are not entitled to recover;" to which the president responded that "what are necessaries, is a question of fact mixed with law. It is to be decided by the jury under the direction of the court, and depends on the estate, circumstances, and pursuits, of the minor. The jury will probably think this bill extravagant, and that the plaintiffs could not have supposed many of the items necessary. Some of them they must have known were not necessary. The plaintiffs cannot recover for what are not necessaries." The defendant excepted, and the jury found for the plaintiffs 937 dollars and 12 cents. The court overruled a motion for a new trial, and gave judgment for the plaintiffs, which was removed into this court by writ of error, where the exceptions were argued by *Marsh* for the plaintiff in error, and by *McKennon* for the defendants; and the opinion of the court was delivered by

Gibson C. J. The case of the plaintiffs below, is poor in merits. It appears that they supplied a young spendthrift with goods which they call necessaries, but which ill deserve the name. Their account mounts up to more than a thousand dollars, comprising charges for many articles which may be ranked as necessaries when supplied in reason, but not at the rate of twelve coats, seventeen vests, and twenty-three pantaloons, in the space of fifteen months and twenty-one days; to say nothing of three bowie knives, sixteen penknives, eight whips, ten whip-lashes, thirty-nine handkerchiefs, and five canes, with kid gloves, fur caps, chip hats, and fancy bag to match. Such a bill makes one shudder. And yet the jury found for the plaintiff almost their whole demand,

including sums advanced for pocket money and to pay for keeping the minor's horses, which no one would be so hardy as to call necessaries. How they could reconcile such a verdict to the dictates of conscience, I know not. They surely could not tamely look upon the corrupting of their own sons by ministering to their appetites and stimulating them with the means of gratification. Every father has a deeper stake in these matters than the public mind is accustomed to suppose; and it intimately concerns the cause of morality and virtue, that the rule of the common law, on the subject, be strictly enforced. The minor was at the critical time of life when habits are formed which make or mar the man — which fit him for a useful life or send him to an untimely grave — and public policy demands that they who deal with such a customer, should do so at their peril. This enormous bill was run up at one store, and what other debts were contracted for supplies elsewhere we know not; but let it not be imagined that the infant's transactions with other dealers, did not concern the plaintiffs. "With a view to quantity, and quantity only," said Baron Alderson in *Burghart* v. *Angerstein* (6 Car. & P. 690) "you may look at the bills of the other tradesmen by whom also the defendant was supplied; for if another tradesman had supplied the defendant with ten coats, he would not then want any more, and any further supply would then be unnecessary. If a minor is supplied, *no matter from what quarter*, with necessaries suitable to his estate and degree, a tradesman cannot recover for any other supply made to the minor just after." And the reason for it is a plain one. The rule of law is that no one may deal with a minor: the exception to it, is that a stranger may supply him with necessaries proper for him in default of supply by every one else; but his interference with what is properly the guardian's business, must rest on an actual necessity, of which he must judge, in a measure, at his peril. In *Ford* v. *Fothergill*, (1 Esp. R. 211; S. C. Peake's N. P. C. 299) Lord Kenyon ruled it to be incumbent on a tradesman, before trusting to an appearance of necessity, to inquire whether the man is provided by his parent or friends. That case may be thought to have been shaken in *Dalton* v. *Gib*, (5 Bingh. N. C. 198) in which it was held that inquiry is not a condition precedent to recovery where the goods seemed to be necessary from the outward appearance of the infant, though the mother was at hand and might have been questioned; but in *Brayshaw* v. *Eaton*, (Id. 231) this was explained to mean, that, as such an inquiry is the tradesman's affair, being a prudential measure for his own information, the omission of it is not a ground of non-suit; but that the question is,

on the fact put in issue by the pleadings, whether the supply was actually necessary. It is the tradesman's duty to know, therefore, not only that the supplies are unexceptionable in quantity and sort, but also that they are actually needed. When he assumes the business of the guardian for purposes of present relief, he is bound to execute it as a prudent guardian would, and consequently to make himself acquainted with the ward's necessities and circumstances. The credit which the negligence of the guardian gives to the ward ceases as his necessities cease; and as nothing further is requisite when these are relieved, the exception to the rule is at an end. In this case the supply of articles which were proper in kind, was excessive in quantity. I impute no intentional wrong to the plaintiffs, for they dealt with the intestate, as others may have done, evidently supposing him to be *sui juris;* but I certainly do blame the jury for finding nearly the whole demand after it had been conceded that he was an infant.

That the charge, though not palpably wrong in the abstract, tended to mislead in its application to the facts, is visible in the verdict it produced. The defendant went to the court for direction that the plaintiffs could not lawfully deal with the infant, even for necessaries, unless the guardian had refused to furnish them; and had, for response, a direction that "the plaintiffs had no right to deal with the deceased, unless by the *permission*, express or implied, of the guardian, *or* unless the guardian had refused to furnish necessaries for his ward." This very significant addition to the principle assumed in the prayer, was meant to indicate a liberty to deal by permission beyond the bounds of necessaries, or it meant nothing. It indicated that an authority to deal with a minor in a way to charge him personally, emanates from his guardian's permission, which is paramount, or at least equal to the authority so to deal with him, that emanates from his necessities. The jury would naturally so understand it. And this was predicated in reference to the question before them, whether the ward's estate could be subjected to payment for luxuries. They might readily understand, therefore, that the guardian's permission to run up this bill, would charge the ward's estate with it, independently of its propriety. If that was not the drift of the direction, it is not easy to see why anything was said about permission at all. In a case of doubtful propriety, I can readily understand how the guardian's sanction, or that of a relative, might justify a supply beyond the limits of strict necessity, which a dealer might furnish *bona fide* on the credit of the ward; but though the guardian might subject himself to payment of a grossly improvident bill, by a permission

amounting to an order, his connivance at an improper supply by a tradesman, would not subject the ward to payment of it.[1] The guardian is set over the ward for the very purpose of preventing him from making such a bill; and his desertion of his trust, would not help the case of one who had dealt with the ward *mala fide*. As, then, the plaintiffs were bound to know that the guardian abused his trust in allowing the infant to run up this bill, they can recover no more of it than was proper to relieve the ward's necessities. This notion that the guardian's permission might legitimate the demand, may have had a decisive misguiding influence on the jury; for a passive acquaintance with the transaction, which the law would presume from his duty to have an eye on the doings of his ward, would be a constructive permission; or it might be implied from the fact that he had left the ward to shift for himself.

Again, the defendant prayed direction, "that if the plaintiffs were justifiable in dealing with the ward, the bill is so exorbitant that the plaintiffs, themselves, could not have considered them, the goods, necessaries; and that they are therefore not entitled to recover;" in answer to which the court charged, that "what are necessaries, is a question of fact mixed with law. It is to be decided by the jury under the direction of the court; and depends on the estate, circumstances, and pursuits, of the minor. The jury will probably think this bill extravagant, and that the plaintiffs could not have supposed many of the items necessary; some of them they must have known were not necessary. The plaintiffs cannot recover for what are not necessaries." Not a word on this as a response to the prayer for direction as to the effect of the plaintiffs' consciousness that the supply was extravagant, though consciousness would affect them with *mala fides*, and deprive them at once of whatever merit they might otherwise have had from the guardian's implied sanction. The judge said truly that what are necessaries is a question mixed of fact and law; but he did not say, as he might, and perhaps ought to have done, that an oversupply of goods otherwise proper, ceases to be a supply of necessaries as to the excess. The jury were indeed left to say what were necessaries; but rather as regards the sort than the quantity, in respect to which the effect of excess was overlooked throughout. Had it been duly impressed, the jury could not have found more than a fourth part of the bill. To them doubtless belongs the

[1] Indeed it is said (3 Wils. Bacon, 595, in marg.) to have been several times decided, that where credit has been given to the parent or guardian, the creditor has no recourse to the infant.

question of extravagance; but where the supply has been so grossly profuse as to shock the sense, it is the business of the judge to say so as matter of law, and charge that there can be no recovery for more than was absolutely necessary.

Judgment reversed and a *venire facias de novo* awarded.

Superior Court of the State of Connecticut for Hartford County, September Term, 1843.

WILLIAM WILSON *v.* THE STATE OF CONNECTICUT.

Affinity created by marriage ceases on the dissolution of the marriage.

Therefore the marriage or cohabitation of a man with the daughter of his deceased wife, by a former husband, is not incest.

It seems, that in a prosecution for incest, hearsay of the fact of birth at the time of the birth, is admissible to prove pedigree, and that although it does not appear that the persons making the declarations are dead, or that they were members of the family.

It seems also, that reputation of the fact of the birth, at the time of the birth, is admissible for the same purpose.

THE plaintiff in error was prosecuted in the county court for Hartford county, at its August term, Huntington J. presiding, for the crime of incest alleged to have been committed with one Hannah Ackley, the daughter of Hannah Wilson his deceased wife, by Josiah Watrous, her former husband. The prosecution was founded upon the statute law of the state which forbids marriage and cohabitation between persons within certain degrees of kindred, including the degree existing between a man and his wife's daughter. The cause was tried to the jury upon the plea of not guilty, and upon bill of exceptions and writ of error brought to this court at its present term. The bill of exceptions, as allowed and signed by the judge of the court below, was as follows.

"The attorney for the state offered to prove the fact, that the said Hannah Ackley was the daughter of Hannah Wilson, the defendant's deceased wife, by the testimony of one Oliver Northam. The said Northam testified that he was about fifty years old, that he well knew Josiah and Hannah Watrous, afterwards Hannah Wilson, who lived together as husband and wife, and raised a numerous family in his neighborhood; that he knew the family well and each of them, that he was twelve or fifteen years old when Hannah Ackley was born; that he heard of her birth at the time it took place; that he saw her before she could walk, but does not

know how old she then was; that he frequently saw, and always knew her from that time until she was bound out at six or seven years of age, and frequently saw and recognised her from that time until she was married to Nathaniel Ackley; — that she was called Hannah Watrous, and was always treated and recognised by the said Josiah and Hannah Watrous as their child; that he was not present at her birth, but knew of it by reputation at the time, and saw the child in the family soon afterwards, and ever since has known her. To this testimony the counsel for the defendant objected, but the court overruled the objection, and admitted the evidence. There was no other evidence offered to prove the parentage of the said Hannah Ackley, and her relation to the defendant's deceased wife, than the testimony of the said Northam, as above recited.

The court charged the jury, that the reputation, or hearing of the said Hannah's birth at the time of the birth, and connected with the testimony of the witness that he had seen the said Hannah Ackley an infant in the family of the said Josiah and Hannah Watrous, and treated and recognised by them as a child, and had continued to know and recognise her until she grew to womanhood and was married, was proper evidence to prove that the said Hannah Ackley was the daughter of the said Hannah Watrous, afterwards Hannah Wilson, in opposition to the claim of the defendant's counsel."

Upon this testimony and the charge of the court as above, the defendant was convicted and sentenced to two years imprisonment at hard labor in the state prison.

Chapman and *Fellows*, for the plaintiff in error, made the following points:

First. The information contains no allegation of the crime of incest.

1. The statute contemplates an existing relation. The words are not *deceased* wife's daughter, not daughter of her who was the wife, but *wife's* daughter, and being a penal statute must be construed strictly.

2. The statute derives its origin from the Jewish law. The words there are, "Thou shalt not uncover the nakedness of a woman and her daughter. If a man take a wife and her mother, it is wickedness." That law forbids to marry the brother's *wife*, but enjoins upon the brother, in certain cases, to marry his brother's *widow*. It appears therefore, that the original law, which is the basis of the statute, contemplated an existing relation.

3. The affinity with the daughter ceased on the death of the wife. It *came* by the marriage, and *went* with the marriage. The *canon* law, devised by ecclesiastics to promote the sale of dispensations, has never been adopted in this state. In *Winchester & Colebrook* v. *Hinsdale*, (12 Conn. Rep. 88), the supreme court held that the relationship of uncle and nephew by marriage, ceased on the dissolution of the marriage, so that the nephew was no longer disqualified to act as judge in a cause to which the uncle was a party. This determination of the supreme court is decisive of the present case.

Second. The evidence admitted by the court below was inadmissible, and the charge of the court to the jury erroneous.

1. Better evidence of the pedigree might have been had. The statute requires a record of births, and did so when Hannah Ackley was born. The presumption of law is that such record exists, unless the contrary be shown. That record, though, perhaps, not primary evidence, is better secondary evidence than that adduced. *Greenleaf on Evidence*, p. 97. *Commonwealth* v. *Littlejohn*, (15 Mass. Rep. 163.)

2. The evidence does not conduce to prove that Hannah Ackley *was born* of Hannah Watrous. The utmost it tends to prove is that she was treated and recognised by Josiah and Hannah Watrous as their child, — a fact perfectly compatible with the supposition that she was *adopted* and not related to them by blood.

3. Hearsay and reputation are admissible to prove pedigree, even in a civil cause, only as exceptions to the general rule; and when admitted must be accompanied by certain sanctions. No case can be found in which they have been admitted to prove a crime.

4. Declarations as to pedigree must come from such persons as were connected with the family, and the *declarants* must be dead. Here it does not appear from whom the declarations came, nor that the declarants are dead. *Greenleaf on Evidence*, p. 116. *Chapman* v. *Chapman*, (2 Conn. Rep. 347.)

5. *The fact of birth* is not a continuing fact, but a particular fact existing only at a single point of time, in regard to which the community can have no common voice. Reputation is inadmissible to prove a *particular fact*. *Outram* v. *Morewood*, (5 Term Rep. 121) *Greenleaf on Evidence*, p. 163.

[*The court* here intimated that the hearsay and reputation of the fact of birth at the time of the birth, sworn to by the witness, were very immaterial, and said if the witness had testified that he heard that Hannah Ackley was born of Hannah Watrous, and that he

knew of such a fact by reputation at the time, that would have been a very different matter.]

That the evidence was in itself immaterial can make no difference. The court below charged the jury that, connected with the other facts, it was proper evidence to prove that Hannah Ackley *was born* of Hannah Wilson. The charge gives it a fictitious importance by making it the *primary* fact. All the rest is mere qualification and circumstance. The more immaterial it is, the greater the error. Besides, 'the qualification and circumstance' is not that required by the law. That the person whose pedigree is in question must grow to womanhood and be married, or that the witness must know her until that precise period of time, has never before been solemnly adjudged.

6. In prosecutions for adultery, incest, bigamy, and *crim. con.* there must be proof of a marriage in fact. Neither cohabitation, reputation, nor even the confessions of the accused, are admissible. The authorities recognise a distinction between the nature of the proof required in ordinary cases of a civil nature, and those in which *the act done is a crime by force of the marriage.* In the case before the court, the act charged, if criminal, is a crime *by force of the birth. The State of Connecticut* v. *Roswell*, (6 Conn. Rep. 446); *Moris* v. *Miller*, (4 Burr. 2057, 2059); *Fenton* v. *Reed*, (4 Johns. Rep. 52); The *Commonwealth* v. *Norcross*, (9 Mass. Rep. 492.)

Toucey, in behalf of the state.

The construction contended for by the counsel for the plaintiff in error renders the statute against incest superfluous. The statutes against bigamy and adultery have precisely the same effect. They prohibit the act equally with this statute, and prescribe the same penalty. The legislature could not have intended, in this enactment, to do a thing perfectly nugatory.

This statute was designed to preserve the peace and purity of families, and to forbid even the idea that the moment the wife is dead, the husband can step into her daughter's bed.

In regard to the admission of the evidence and the charge of the court, the record which the law requires is not primary evidence. The testimony could not therefore be excluded on this ground.

The reputation, set forth on the record, is mere hearsay, and the hearsay in this case is admissible as a part of the *res gestæ;* it is a mere fact like the other facts detailed by the witness. That the witness heard of the birth and knew of it by reputation at the time, is so perfectly immaterial as not to be the ground of any error.

The court charged the jury that it was admissible, connected with the other testimony. That it appears on the record as the *primary* fact, is the work of the counsel, and not of the court below.

The court, after hearing the agument, reserved the cause for the advise of the other judges of the supreme court, at their annual meeting in November, and afterwards pronounced the judgment in substance as follows:

Waite J. I have consulted with my brethren of the supreme court; and we are of opinion that this case cannot be distinguished from that of *Winchester & Colebrook* v. *Hinsdale*, decided by the supreme court. The affinity between the plaintiff in error and Hannah Ackley was dissolved by the death of her mother. The judgment of the court below must therefore be reversed on the ground that the acts charged do not constitute the crime of incest. The decision of the other questions becomes, therefore, unimportant. We think, however, the evidence was admissible.

Supreme Judicial Court, Massachusetts, December, 1843, *at Boston.*
In Equity.

Sarah Clap, Administratrix, *v.* John Davis, Administrator.

The creditors of a deceased intestate, to whom a dividend has been ordered upon a commission of insolvency, have a vested and indefeasible right to their respective dividends; and where certain dividends remain, unclaimed, in the hands of the administrator, he cannot be compelled to distribute the amount thereof among the other creditors.

This was a bill in equity, brought by the plaintiff, as the administratrix of William Clap, deceased, one of the creditors of James Tisdale, deceased, in behalf of herself, and such other creditors, as should become parties to the suit, against John Davis, administrator of the said Tisdale. The facts were these: Tisdale died intestate, and the defendant was appointed administrator, January 15, 1799. He represented the estate insolvent, and a commission was duly issued. Among the debts allowed, was one due the plaintiff's intestate, of $25,062,72. The second account of the administrator was filed July 28, 1806, and the third account was filed, February 2, 1831. Upon each of these returns, a dividend was ordered. Under the first, Clap received $1,656,59, and under

the second, his administratrix received $1,852.55. At the time the bill was brought, there remained due to Clap's estate, after making certain deductions, the sum of $19,605.47.

A portion of the creditors, whose claims were allowed, never claimed or received their dividends, which remained in the hands of the administrator. All but three of these unclaimed dividends were very small sums. Of those three creditors, one firm resided in Teneriffe, and their agents in New York received the first dividend, but declined to receive the second. Another creditor firm became bankrupt, and their assignee in bankruptcy received the first dividend, but the assignee and one of the partners deceased before the second dividend was declared. The surviving partner claimed the dividend, alleging that the proceedings in bankruptcy were closed, and that he was entitled to receive the dividend, but the administrator, after consulting counsel, believed that he could not safely pay it over, and declined to do so. The other principal creditor, whose second dividend remained unclaimed, was believed to have died intestate, more than twenty years before the filing of the present bill, and no administration was taken on his estate in Massachusetts. The amount of these unclaimed dividends was kept invested by the administrator, and on the 15th of April, 1842, amounted to the sum of $2,884.98.

The plaintiff brought the present bill, praying for a discovery of the amount of the dividends unclaimed, and for a distribution of the same, by a new dividend, among the creditors, who should come in and become parties to the suit, and contribute to the expenses thereof. The answer of the respondent, after fully setting forth the facts of the case, submitted to the court whether a trust had arisen in favor of the creditors, whether the complainant could lawfully bring her said bill, without joining, as parties defendant, the creditors whose dividends were sought to be distributed, or their personal representatives; whether the said dividends could be so distributed anew; whether the next of kin of Tisdale should have been made parties defendant; whether such next of kin had a right to require the statute of limitations to be pleaded; and whether some public notice should not be ordered to those creditors whose dividends remained unclaimed.

Sidney Bartlett, for the complainant.
B. R. Curtis, for the respondent.

Shaw C. J. The question is, whether the plaintiffs, and other creditors of James Tisdale, have now a right to an appropriation

to themselves of dividends heretofore appropriated to other creditors who proved their claims, on the ground that those creditors have not claimed them, and from lapse of time and other circumstances there is no reason to believe, that such dividends ever will be claimed by those creditors, or their representatives. Upon the best consideration I have been able to give this question, I can perceive no ground in law or equity, upon which this claim can be maintained. It is not that the defendant has himself any beneficial interest in the money, or right to hold it on his own account, but that the plaintiffs have no right to require him to pay it to them, and they must recover, if at all, on the strength of their own title. Nor do I think that the defendant has a right to hold it for the heirs at law of the intestate. Heirs at law surely can take nothing by distribution until the debts of the intestate are fully paid.

Until a decree of distribution, all the creditors have an interest in the estate of their common deceased insolvent debtor, and this interest in common extends to the whole fund. If, therefore, some of the creditors, after the actual or constructive notice required by law to be given, do not come in and prove their claims, the presumption of law is, that no such claims exist, they are not deemed in law to be creditors, and then the whole fund is rightfully divided amongst those, who alone having proved their claims, are the only creditors. But when a regular decree of distribution takes place, that interest in common in the whole fund ceases, a judicial partition of it is established, and each creditor to whom a dividend is made, comes thenceforth to have a legal, vested, absolute and exclusive interest in the share so apportioned to him. The administrator, so far as he is a debtor, becomes the debtor of each distributee, to the amount of his dividend, and ceases to be a debtor for the whole to the creditors in common; so far as he is a trustee, each distributee is *cestui que trust* for his share, and not the creditors as a body.

It may, perhaps, tend somewhat to strengthen this conclusion, that the right of each distributee to his share is, by force of the statute, a legal right, and if not paid on demand, an action will lie against the administrator and the sureties on his bond. This right is not dependent upon any condition or contingency, but is indefeasible. If a demand were now made by one of these distributees, for his dividend, and the defendant should decline to pay, it is not easy to perceive why an action at law would not lie on his bond. It may perhaps be said, that the action would be barred by the statute of limitations. I have very great doubts of this, because the cause of action does not accrue till demand, and the statute of

limitations begins to run from the time of the accruing of the cause of action. But suppose it were held otherwise, the defence would rest upon a provision of positive law, which law itself is founded on the conclusive legal presumption, a presumption not to be rebutted or affected by evidence, that the debt, that is, such dividend decreed to such individual creditor, has been paid. Either way of considering it assumes, that after a decree of distribution, the right to the dividend is individual and exclusive, and precludes the supposition that the other creditors continue to have any interest in common in the dividends.

Nor do I think the decisions under the English bankrupt laws, afford any analogy in favor of such claim. They are founded on the express provisions of the bankrupt laws. Take, for instance, stat. 6 Geo. IV, c. 16, § 110, which provides that after one year, assignees shall under severe penalties report the amount of unclaimed dividends, which by order of the lord chancellor, or of the commissioners, may be invested, and then, after the expiration of three years, the lord chancellor may, if he think fit, order the distribution of such unclaimed dividends amongst the other creditors, and the proof of the creditors to whom such dividends were allotted, shall from thenceforth be considered as void as to the same. By this provision, they are put on the same footing, as if they had never proved their debts, and are not regarded as creditors.

It was ingeniously argued in the present case, that although the decisions under the English bankrupt law were founded on positive enactment, yet the law itself was based upon a principle of equity and natural justice. But could an English court of equity, without the aid of such statute provision, recall a dividend made to one creditor, and distribute it amongst others? If the bankrupt law, or the law in regard to the settlement of deceased insolvents' estates have given an exclusive and unconditional title to the dividend to an individual creditor, and a legal remedy to enforce the payment, then a new distribution of such unclaimed dividends to the ôther creditors, would be to take away the vested right of one and give it to another, which I think a court of equity could not do. Still, there is no doubt that the statute is founded on strong considerations of right, policy and natural justice, but these considerations would not warrant a court of equity to take away a vested interest, without the aid of the statute; it is the statute, which creates the equity in favor of the other creditors, in certain contingencies, to the unclaimed dividends.

By a general law, in force when the dividend is made, which all subjects are presumed to know, and by which the rights of all are

regulated, the dividend to each creditor is liable to be recalled, and divided amongst other creditors, if not claimed in three years. This renders the allotment itself conditional and defeasible upon a contingency, as much as if it had been inserted in the decree making the distribution. It therefore affords no analogy for a like proceeding under our statute, where the allotment is absolute and indefeasible.

I am not aware of any point decided in the case of *Harris* v. *Andrews*, affecting the present case; I cannot find, nor do I remember, that any question was argued and decided. It seems, by the papers, to be a case where certain persons had signed an assignment, as creditors, but upon a reference to a master, to receive and examine the claims of creditors, if they failed to come in, on due notice given, and prove their claims, they were excluded from the dividend. If such was the case, it has no bearing upon the present. A creditor not proving his claim, is, in contemplation of law, no creditor. In considering a case like the present, especially one somewhat new in its aspect, it is necessary to place it upon some grand principle, which would be applicable to other cases, and not be too much influenced by the peculiar circumstances of the particular case. The circumstances of the present case are very strong. Almost forty-five years have elapsed since the death of the intestate, nearly forty since the first dividend, and ten or twelve since the latter. Hardly a case can be imagined, where the improbability of the appearance of the particular distributees would be greater. But if a court of equity can interfere in such a case, and order a new distribution after thirty years, may it do so after twenty, or ten, or a shorter time? Shall it depend upon mere lapse of time, or will the court inquire into the circumstances of each distributee to ascertain whether he is dead or bankrupt, or generally into circumstances to decide whether he is likely ever to appear, or any personal representative in his behalf, to claim the dividends, or will the court simply order a general or particular notice?

The obvious difficulty attending the practical application of such a principle, together with the fact that no such principle has ever been acted upon by any judicial tribunal, has some tendency to show, that the principle upon which a new distribution is sought to be established by this bill is not sound.

Digest of English Cases.

COMMON LAW.

Selections from 11 Meeson & Welsby, parts 1 and 2; 2 Dowling's Practice Cases (New Series), part 4; 2 Queen's Bench Reports, parts 2 and 3; 5 Scott's New Reports, parts 2 and 3. Continued from page 329.

ACTION ON THE CASE.

(*For fraudulent use of mark on manufactured articles—Evidence.*) The declation stated that the plaintiff, a manufacturer and exporter of iron, had for many years been accustomed to mark iron manufactured by him for the Turkish market, with the letters W. C., inclosed within an oval figure, and had gained great reputation for the excellent quality of the iron so manufactured and marked by him; and that the defendant, wrongfully and fraudulently manufactured iron of similar form, and marked the same with a stamp or mark in imitation of the plaintiff's mark, consisting of the letters W. O. inclosed within an oval figure, which last mentioned mark the defendants well knew to be in imitation of and similar in appearance to the plaintiff's mark, and so used by them to denote that the iron so made was of the genuine manufacture of the plaintiff, and wrongfully and fraudulently sold the same as and for iron manufactured by the plaintiff. At the trial, the witnesses for the plaintiff stated that the W. O. was very likely to be mistaken for W. C. when the impression of the die was imperfect, or the iron had been exposed to the air, and that more especially the people in Asia Minor, who were the principal consumers of the iron, were likely from their ignorance of the English character to be deceived by it. For the defendants, several witnesses stated that it was usual for iron manufacturers to mark iron according to orders received from purchasers, and it was proved that all the iron marked by the defendants with the mark so complained of, had been so marked in obedience to directions received from the merchants. Two points were left to the jury, — first, whether the mark so used by the defendants so closely resembled the mark of the plaintiff as to be calculated to deceive persons of ordinary skill and care, and to induce them to believe the iron so marked and sold to them was iron manufactured by the plaintiff, — secondly, whether such mark was so used by the defendants with a fraudulent intention to procure their iron to be received in the market as iron of the plaintiff's manufacture, or bonâ fide in the execution of foreign orders. The jury having found for the defendants, and the learned judge reporting that he was not dissatisfied with the verdict, the Court held that the direction was correct, and refused to grant a new trial. *Crawshay* v. *Thompson*, 5 Scott, N. R. 562.

2. (*Damages in — When costs of litigation by plaintiff recoverable against wrongdoer.*) In an action for running down a ship, it appeared that the plaintiff had been obliged, in consequence of the injury, to employ a steam-tug, the owners of which demanded 150*l.* for salvage, and commenced a suit in the Court of Admiralty against the plaintiff, who paid 20*l.* into Court; the Court ultimately decreed 45*l.* to the salvors: Held, upon these facts, that the plaintiff was not entitled to recover the amount of the costs incurred by him in that suit.

Semble, that the proper question for the jury in such a case is, whether, in respect to the suit for salvage, the plaintiff pursued the course which a prudent and reasonable man would do in his own case: and that if the jury think he did, the costs of the suit may be recovered. (7 M. & W. 601; 10 M. & W. 249.) *Tindal* v. *Bell*, 11 M. & W. 228.

BAILMENT.

(*Liability of gratuitous bailee for negligence.*) A person who rides a horse gratuitously, at the owner's request, for the purpose of showing him for sale, is bound in doing so to use such skill as he actually possesses; and if proved to be a person conversant with and skilled in horses, he is equally liable with a borrower for injury done to the horse while ridden by him. *Wilson* v. *Brett*, 11 M. & W. 113.

BANKRUPTCY.

(*Husband and wife — When wife's chose in action passes to assignees of husband.*) The assignees of a bankrupt may maintain an action in their own names only, for a chose in action belonging to the wife of the bankrupt before marriage, as a promissory note given to her dum sola.

BILLS AND NOTES.

(*Notice of dishonor.*) Notice in these terms, "I hereby give notice that a bill for 50*l.* at three months after date, drawn by A. on and accepted by B., and indorsed by you, lies at, &c., dishonored" — held sufficient, without further intimation that the plaintiff looked to the defendant for payment. *King* v. *Bickley*, 2 Q. B. 419.

2. (*Same.*) Notice as follows held sufficient, "Your draft on C. for 50*l.* due 3d March, is returned to us unpaid; and if not taken up this day, proceedings will be taken against you for the recovery thereof." (8 Bing. N. C. 688; 2 M. & W. 799; 2 Q. B. 388; 1 Man. & G. 76.) *Robson* v. *Curleurs*, 2 Q. B. 421.

3. (*Drawer of bill, when discharged by time given to acceptor.*) It is no defence to an action against the drawer of a bill of exchange, that the proceedings in an action against the acceptor had (without *his* consent) been stayed at an earlier stage by a judge's order, to pay debt and costs in three weeks, otherwise judgment. *Kennard* v. *Knott*, 5 Scott, N. R. 247.

4. (*Notice of dishonor.*) In an action against the drawer of a bill of exchange, the issue being whether or not the defendant had received notice of dishonor, an admission by the defendant of his liability is primâ facie evidence (only) whence the jury may infer that he had due notice. *Bell* v. *Frankis*, 5 Scott, N. R. 460.

5. (*Indorsement, how far a new drawing — Account stated.*) A declaration alleged that the defendant made his bill of exchange, and directed the same to J. B., and required him to pay to the defendant's order 187*l.* 15*s.*, and then indorsed the bill to the plaintiffs. It appeared that the bill had been drawn by one F., and indorsed by the defendant in blank, and having been delivered by the defendant to F., was by him taken to a bank of which the plaintiffs were the managers, where it was received by them in renewal of another bill discounted by them, and drawn and indorsed by the same parties: Held, 1st, that proof of the defendant's being the indorser of the bill did not support the averment that he made the bill; 2dly, assuming that an indorser might be treated as a drawer, still the present indorsement, being in blank, was equivalent to the drawing of a new bill payable to bearer, and therefore the bill was misdescribed in the declaration; 3dly, that the plaintiffs were not entitled to recover on the account stated. *Burmester* v. *Hogarth*, 11 M. & W. 97.

6. (*Estoppel on acceptor to deny forged indorsement.*) A bill of exchange, purporting to be drawn by B. & W. (a really existing firm) payable to their order, and to be indorsed by them, was negotiated by the acceptor with that indorsement upon it. The drawing and indorsement were forgeries: Held, that if the bill was accepted, and negotiated by the acceptor, with knowledge of the forgery, he was estopped to deny the indorsement, as well as the drawing, by B. & W.: but *semble*, that where the name of a real party, as the drawer, is forged, a party who accepts the bill in ignorance of the forgery, is estopped to deny the drawing only, but not the indorsement, although in the same handwriting. (10 B. & Cr. 468; 7 Taunt. 455.) *Beeman* v. *Duck*, 11 M. & W. 251.

GOODS SOLD AND DELIVERED.

(*For what chattels maintainable.*) Indebitatus assumpsit in the sum of 3000*l.* "for the price and value of a main engine and other goods *sold and delivered*." It was proved at the trial, that the contract was "to build an engine of 100 horse power for the sum of 2500*l.*, to be *completed and fixed* by the middle or end of December;" and it appeared that the different parts of the engine were constructed at the plaintiff's manufactory, and sent in parts at different intervals to the defendant's colliery, a distance of twenty miles, where they were fixed piecemeal, and so made into an engine: Held, that the price agreed upon was not recoverable in the above form of action.

Semble, that the proper form of count was, either in indebitatus assumpsit for work, labor, and materials, or for erecting and constructing an engine. *Clark* v. *Bulmer*, 11 M. & W. 243.

HUSBAND AND WIFE.

(*Pledge by wife of husband's goods.*) In trover by the personal representatives of G., for a chest of plate which the defendants claimed to hold as security for an advance of money, an examination upon interrogatories of the widow of G. was given in evidence, to show that the plate was pledged by her with the assent of her late husband: Held, that such examination was inadmissible, as being contrary to the general policy of the law. *O'Connor* v. *Majoribanks*. 5 Scott, N. R. 395.

2. (*Marital right to money by wife living apart.*) A husband and wife lived apart from each other; at the death of the wife she was possessed of money, which was assumed to be the accumulations of interest arising from stock settled to her separate use: Held, that the husband was entitled to this money in his marital right.

The money was taken possession of for her father, (who was one of the executors named in a will made by his wife under a power reserved to her by the settlement, but which will did not in terms pass the accumulations,) to whom it was handed over immediately: Held, that the original taken being wrongful, the defendant could not discharge himself by thus dealing with the money. *Tugman* v. *Hopkins*, 5 Scott, N. R. 464.

3. (*Scire facias to join husband in suit, when necessary.*) Where an action is brought by a feme sole, who marries after the commencement of the suit, but before the trial, it is not necessary to sue out a scire facias, to make the husband a party to the suit. (2 Saund. 72 i.) — *Walker* v. *Golling*, 11 M. & W. 78; 2 D. P. C. (N. S.) 776.

INFANT.

(*Necessaries, what are.*) Dinners, confectionary, or fruit, supplied to an infant, an undergraduate in the University, having lodgings in the town, are not, primâ facie, necessaries; and in an action brought against him for such articles, no special circumstances being shown, the Court directed a nonsuit to be entered. *Brooker* v. *Scott*, 11 M. & W. 67.

2. (*Account stated by — Ratification after full age — Pleading — New assignment.*) An account stated by an infant is not absolutely void, but voidable only, and may be ratified by him after attaining his full age; and if he does so ratify it, an action of *debt* as well as assumpsit may be maintained thereon.

Quære, whether to a plea of infancy, the plaintiff ought to new assign the ratification as a new contract entered into after the party has obtained the capacity of contracting, or plead it by way of replication, as an act giving validity to an otherwise invalid contract. *Williams* v. *Moor*, 11 M. & W. 256.

INSURANCE.

(*Life policy, construction of — Death of assured, by his own hands, what is.*) In the year 1828 a policy was effected by one W. B. upon his own life, with a proviso that, "in case the assured should die upon the seas (except in such passages as were allowed by the rules of the society), or go beyond the limits of Europe, or enter into or engage in any naval or military service whatsoever, unless license should be obtained from a court of directors of the society, or should *die by his own hands*, or by hands of justice, or in consequence of a duel, &c. &c., the policy should be void." In 1838 the assured, being at the time of unsound mind, precipitated himself from Vauxhall Bridge into the Thames, and was drowned. In an action brought by his executor on the policy, the jury found that the assured

"voluntarily threw himself into the river, knowing at the time that he should thereby destroy his life, intending thereby to do so, but that at the time of committing the act he was not capable of judging between right and wrong:" Held, (dissentient Tindal, C. J.), that upon this finding the defendant was entitled to the verdict, the proviso embracing *all cases* of intentional self-destruction. *Borradaile* v. *Hunter*, 5 Scott, N. R. 418.

2. (*Interest.*) A person who assigns away his interest in a ship or goods, after effecting a policy of insurance upon them, and before the loss, cannot sue upon the policy; except as a trustee for the assignee, in a case where the policy is handed over to him upon the assignment, or there is an agreement that it shall be kept alive for his benefit. *Fowles* v. *Innes*, 11 M. & W. 10.

3. (*Misrepresentation and concealment by assured.*) The Shipping List at Lloyd's, stating the time of a vessel's sailing, is *primâ facie* evidence against an underwriter as to what it contains, as the underwriter must be presumed to have a knowledge of its contents, from having access to it in the course of his business: but where the insurer, in a letter written for the purpose of effecting the insurance, made a false statement and concealment as to the time of the vessel's sailing, and the underwriter, relying upon that representation, did not in fact look at the list, but acted upon the representation in making the insurance: Held, that the underwriter was not bound by the contents of the list, so as to render the misrepresentation and concealment by which he was misled immaterial, and that it was the duty of the judge to have pointed out to the jury that misrepresentation and concealment. *Mackintosh* v. *Marshall*, 11 M. & W. 116.

4. (*Insurance, "lost or not lost." — Interest. — Pleading. — Argumentative general issue.*) Declaration on a policy of insurance stated, that the plaintiff caused a policy to be effected, purporting thereby and containing therein, that B. and Co., as well in their own names as in that of all parties interested, made assurance with the defendants for 2000*l.* on goods (declared to be 360 bales of cotton), *lost or not lost*, at and from Bombay to London; and that in consideration thereof, and that the plaintiff paid the defendants the premium, and agreed to observe the terms and conditions of the policy, the defendants promised him that they would become assurers to the plaintiff of the said sum of 2000*l.* The declaration then averred that the goods were shipped on the voyage; that the plaintiff was during the voyage, to wit, on &c., interested in the goods to the amount insured; that the assurance was made for the use and benefit and on the account of the plaintiff; that the ship sailed, and met with tempestuous weather, whereby the goods were wetted and damaged, and rendered of no use or value to the plaintiff: Held, that a plea to this declaration, that the goods were so damaged before the plaintiff acquired any interest therein, was bad on general demurrer.

A party may make an insurance on goods lost or not lost, though he have acquired his interest in them after a partial loss, unless he bought them with a knowledge of the damage.

A plea to the above declaration, that the policy was not caused to be made by or on behalf of the plaintiff, was held bad on special demurrer, as amounting to non assumpsit. So also was a plea that the plaintiff did not pay the premium, nor promise the defendants to observe the terms and conditions of the policy.

A defendant is not at liberty to traverse any single material fact which would be included in the general issue.

The plea of non assumpsit puts in issue the consideration for the promise as well as the promise itself. *Sutherland* v. *Pratt*, 11 M. & W. 296; 2 D. P. C. (N. S.), 813.

LIBEL.

(*Pleading to part of — Inducement, when properly traversed.*) Declaration for libel averred, that before and at the time of the committing of the grievance by the defendant, the defendant used the word "black-sheep" for the purpose of expressing and meaning, and it was understood by the persons to whom the libel was addressed as expressing and meaning a person notorious by reason of bad character, and of stained and sullied reputation: yet the defendant, intending to cause it to be believed that the plaintiff had conducted himself dishonestly and improperly, published of and concerning the plaintiff the libellous matter following; — "Black-sheep"

(meaning thereby that the plaintiff was a black-sheep, in the sense and meaning in which the word was so used by the defendant. [The declaration then set forth a statement of facts respecting the plaintiff, no part of which was in itself libellous.] The defendant pleaded, as to the publishing of the following part of the supposed libel, that is to say, "black-sheep," that the defendant did not use that word for the purpose of expressing or meaning, nor was it understood by the persons in the declaration mentioned as expressing or meaning, a person notorious by reason of bad character, or of stained and sullied reputation: concluding to the contrary: Held, on special demurrer, 1st, that the plea was well pleaded to that part only of the libel: 2dly, that it was rightly pleaded as to the publishing of that part of the libel, and not to the inducement in the declaration as to that part: and, thirdly, that it was not bad as amounting to not guilty; the averment in the declaration, as to the word "black-sheep," being properly matter of *inducement*, which it was necessary to traverse specially. *M'Gregor* v. *Gregory*, 11 M. & W. 287; 2 D. P. C. (N. S.) 769.

MASTER AND SERVANT.

(*Discharge of servant for disobedience — Pleading.*) Where an agreement contained an attestation clause, and, subjoined to it, the name of a person as an attesting witness, but the name was written in pencil, and not by the supposed witness, but by one of the parties to the instrument: Held, that there was no primâ facie evidence of there being an attesting witness, so as to render it necessary to call the supposed witness, and that the signatures of the parties might be proved by other evidence.

To an action against the defendants, proprietors of a cotton manufactory, for refusing to employ the plaintiff as manager pursuant to agreement, and discharging him from their service before the period mentioned in the agreement; the defendants pleaded, that the plaintiff so wrongfully, disobediently, and unskilfully conducted himself as such manager, that they, the defendants, suffered and sustained great loss, to wit, to the amount of 1000*l.* &c.: Held, that, in order to support such a plea, it was necessary to show, not only disobedience, but such disobedience as occasioned a loss, and there being no evidence of any loss, that the plea was not supported.

Where there has been disobedience, or an act of misconduct by a servant, known to the master at the time he discharges him, although the master does not mention that as the precise ground of discharge, he may afterwards, by showing that the fact existed, and that he knew it, justify such discharge: but *semble*, that it is otherwise where the act of misconduct was not known to the master at the time of the discharge, as it could not then be the cause of it. *Cussons* v. *Skinner*, 11 M. & W. 161.

NUISANCE.

(*Right to abate private nuisance — Request, when necessary.*) A party has no right to enter upon the land of another in order to abate a nuisance of filth without previous notice or request to the owner of the land to remove it, unless it appear that the latter was the original wrongdoer, by placing it there, or that it arises from a default in the performance of some duty or obligation cast upon him by law, or that the nuisance is immediately dangerous to life or health. (5 Rep. 100; Jenk. 6th cent., 57.) — *Jones* v. *Williams*, 11 M. & W. 176.

PATENT.

(*Novelty.*) The plaintiff took out a patent for the application of anthracite or stone-coal combined with a hot-air blast in the smelting or manufacture of iron from iron-stone mine, or ore. The use of the hot-blast was already the subject of a former patent, granted to one Neilson, and was used by the plaintiff under a license from him; but the combination of the hot-blast with the use of anthracite in the smelting of iron was new, and the result appeared to be a larger yield at a smaller cost, and a better quality of iron, than under the former process by means of the combination of the hot-blast with coke from bituminous coal: Held, that this new combination was a "new manufacture within the meaning of statute of James. Neilson's stated that the blast was to be passed from the bellows or blowing apparatus into an air-vessel or receptacle" (not particularly describing its form,) and through or from that vessel

or receptacle by means of a tube, pipe, or aperture, into fire, forge or furnace. The air-vessel used by the plaintiff consisted of a coil or succession of *tubes* so constructed as to expose to the action of the fire by which it was heated a larger surface of the air in its transit to the furnace, and thereby materially increase the temperature of the blast: Held that the hot-blast thus used by the plaintiff was substantially Neilson's hot-blast.

The degree of labor and expense of experiments does not properly enter into the consideration of whether or not an invention is the subject-matter of a patent. *Crane* v. *Price*, 5 Scott, N. R. 338.

SHIP.

(*Authority of master to borrow money.*) In a home as well as in a foreign port, the master of a ship has an implied authority to borrow money for the necessary use of the ship, if the owner be absent, and no communication can be had with him without great prejudice and delay. (6 M. & W. 138.)

But where the ship was in the port of Swansea, and the owner at Llanelly, eleven miles off, and the master, wanting money to clear the vessel, and having been unable to raise it as the owner had directed, by selling part of the cargo, sent several messages to the owner for money, but, receiving none, borrowed 10*l.* of the plaintiff, telling him of those applications to the owner: Held, that this borrowing was not authorized, and that the plaintiff could not recover it from the owner; though the jury found that it was advanced for the necessary use of the ship, and on the credit of the owner, not of the master. *Johns* v. *Simons*, 2 Q. B. 425. See also *Stonehouse* v. *Gent*, id. 431, n.

TENDER.

(*Right of inspection of goods by purchaser.*) An allegation of a tender of goods is not supported by proof of a delivery or offer to deliver closed casks, said to contain them; but they should be tended in such a way that the party may have a reasonable opportunity of inspecting them, and of ascertaining whether what he has bargained for is presented for his acceptance. (10 M. & W. 757.) — *Isherwood* v. *Whitmore*, 11 M. & W. 347.

USURY

A party having applied to the defendant for the loan of a sum of 6700*l.* for twelve months, on the security of a mortgage of freehold property, the defendant refused to advance the money unless the borrower would give him a promissory note for the amount, to be discounted by him at 5*l.* per cent. This the borrower agreed to, and a bond and mortgage were given for 6700*l.*; and the sum of 6365*l.*, the amount of the note minus the discount and charge of preparing the securities, was paid to the borrower. An ejectment having been brought to recover possession of the premises, on the ground that the mortgage was invalid as being given for an usurious consideration, the jury found that the primary object of the transaction was the discounting of the note, the mortgage being only a collateral security in the event of the note not being paid: Held, that the transaction was not usurious, and that the mortgage was valid independently of the recent stututes 7 Will. 4 & 1 Vict. c. 80, and 2 & 3 Vict. c. 27. — *Doe* d. *Haughton* v. *King*, 11 M. & W. 333.

VENDOR AND PURCHASER

(*Of leaseholds — Vendor's liability to make out a good title.*) In every contract for the sale of leaseholds, there is, in the absence of an express stipulation to the contrary, an *implied* undertaking on the vendor's part to make out the lessor's title to demise. Where in declaring on such contract, the undertaking is alleged as an *express*, instead of an implied one, the variance is cured by an indorsement on the record under 3 & 4 Will. 4, c. 42, s. 24. The purchaser's solicitor wrote to the vendor's solicitors, that unless certain proof of title were adduced, the purchase must go off: Held, that this did not preclude the purchaser from maintaining an action for the expenses he had been put to in investigating the title. *Hall* v. *Betty*, 5 Scott, N. R. 508.

EQUITY.

Selections from 2 Hare, parts 1 and 2; 11 Simons, part 4; 2 Younge & Collyer, part 1. (Continued from page 179.)

BANKING COMPANY.

(*Liability after mistaken payment.*) A banking company having in acknowledgment of moneys deposited by A. given him receipts transferable by indorsement, and such receipts having been fraudulently indorsed by a relative of A. having the same christian name and surname, and so paid by the bank: Held, that the bank was liable to pay them over again, and that the representatives of A. being obliged to come into equity for a discovery, and also for delivery up of the receipts, might obtain a decree for payment also. *Pearce* v. *Creswick*, 2 H. 286.

COPYRIGHT.

(*Partial copyright — Purchase of edition.*) By an agreement between an author (Sir E. Sugden) and a bookseller, it was agreed that Messrs. H. (printers) should print 2500 copies of the work in type and page corresponding with another of the author's works, at the sole cost of the bookseller, and that the latter should pay to the former for the said edition a certain sum by instalments; the work to be divided into three volumes, and sold at a fixed price.

Held, that the bookseller was not merely a purchaser of 2500 copies of the work, but was in equity an assignee of the copyright of it, to the extent that he was to be the sole publisher of it until the whole edition should be sold, and might maintain a bill by him to restrain a piracy of the work: Held also, that, notwithstanding some of the passages alleged to have been pirated were contained in the prior editions as well as the new edition of the work, the plaintiff was entitled to rely upon them, in aid of his title to the relief prayed. The injunction having been granted on the plaintiff undertaking to try his right at law, and the author declining to allow the plaintiff to bring the action in his name, the defendant was ordered to admit at the trial that the plaintiff was the legal proprietor of the pirated work. *Sweet* v. *Cater*, 11 Sim. 572.

2. (*Rival Works — Disparaging advertisements.*) Where there are two rival works, the court will restrain the proprietor of one of them from advertising it in terms calculated to induce the public to believe that it is the other work, but will not restrain him from publishing an advertisement tending to disparage that other work. *Seeley* v. *Fisher*, 11 S. 581.

DISCOVERY.

(*Duty of defendent to inquire.*) In answer to a bill seeking to impeach a security and requiring the defendant to set forth what communications passed between his solicitor and agents in the transaction and the plaintiff, and what letters were written and received, and entries made on the subject by such solicitors, it is not sufficient for the defendant to say, that the solicitors had ceased for several years since the transaction to be his solicitors or agents, and that he does not know what communications or entries they had or made; but the defendant must show that he has endeavored to acquire the information asked for. *Earl of Glengall* v. *Frazer*, 2 H. 99.

DOWER.

(*Election.*) An annuity charged on all testator's real estate, and the devise of a house during widowhood, held to be no bar to dower; but the question was reserved, whether in the event of the widow marrying again she would be entitled to dower out of the house. *Holdich* v. *Holdich*, 2 Y. & C. 18.

FRAUD.

(*Medical attendant — Fictitious consideration.*) A deed purporting to be a conveyance by way of sale of real estate from an aged and infirm person to his intimate friend and medical attendant, set aside for fraud, the money apparently paid at the execution of the

deed having been provided by the grantor for the purpose, and the transaction having been kept secret from the household and family of the grantor. *Gibson* v. *Russell*, 2 Y. & C. 104.

HUSBAND AND WIFE.

(*Separation — Equity for a settlement.*) A married woman who had left her husband, and was living separate from him, but not in a state of adultery, held to be entitled to a settlement out of a sum of stock, to which her husband had become entitled in her right. *Eedes* v. *Eedes*, 11 S. 569.

INFANT.

(*Next friend.*) The court will not remove a next friend merely because he is nearly related to or connected with the defendant; but it must see that there is a probability that the infant's interest will be prejudiced, if the next friend is allowed to remain. *Bedwin* v. *Asprey*, 11 S. 530.

MORTGAGE.

(*Arrears of interest — Collateral security — Statute of Limitations.*) Under the statutes 3 & 4 Will. 4, c. 27, s. 42, and 3 & 4 Will. 4, c. 42, s. 3, a mortgagee of land, whose mortgage debt and interest are secured also by a bond or covenant, is entitled in a foreclosure suit as well as in a redemption suit to charge the mortgaged estate with the full arrears of interest accruing on the mortgage debt within twenty years before the institution of the suit; but if the debt and interest are secured only by the mortgage, the mortgagee is entitled to no more than six years' arrear of interest. *Du Vigier* v. *Lee*, 2 H. 326.

2. (*Foreclosure before answer.*) On a motion by a defendant for an immediate decree in a foreclosure suit, under the statute 7 Geo. 2, or under the jurisdiction of the court, independent of the statute, the order may be made without answer; and if the bill suggests that the defendant has parted with the equity of redemption, he will be allowed to give the required discovery as to that fact upon affidavit. *Piggin* v. *Cheetham*, 2 H. 80.

3. (*Foreclosure — Costs — Pleading.*) The court refused to grant to a mortgagee of leaseholds the costs of citing the next of kin of the mortgagor in the ecclesiastical court, in order to compel him to take out administration, because no case was made for the costs by the bill, and leave was refused to present a petition for the purpose. *Ward* v. *Barton*, 11 S. 534.

4. (*Redemption by creditor.*) The plaintiff in a creditors' suit, after a decree for sale of the real estate, may sustain a suit for redemption against a mortgagee, or a party entitled to a lien on the title deeds. *Christian* v. *Field*, 2 H. 177.

5. (*Satisfaction by bills of exchange — Collateral security.*) Where there was a mortgage payable in 1844, with interest only in the meantime, and in 1839 the mortgagor paid the principal by cheque and gave two bills, accepted by himself, but drawn by a third party, for the arrears of interest, and thereupon the following receipt was executed by the mortgagee: "London, 23d December, 1839. Received the sum of 7000*l.* in cash, and two bills of exchange as under for 3120*l.*, drawn by C. & Co. of M., upon and accepted by the said C. the mortgagor, and which cheque for 7000*l.* and bills for 3120*l.*, making together 10,120*l.*, are in full of principal and interest due to me upon a mortgage of C.'s freehold property in K. and S. for 10,000*l.*, and I do hereby undertake whenever required, to execute a conveyance of the said property. (Signed,) T." The deeds were delivered up to the mortgagor together with this memorandum, but the estate was not reconveyed. The cheque was paid, but the bills were dishonored: Held, that the mortgagee was entitled against the assignees of the bankrupt mortgagor to have the deeds redelivered up, and to have a foreclosure of the estate. *Teed* v. *Carruthers*, 2 Y. & C. 31.

6. (*Waste by mortgagor.*) The mortgagee in the case of an insufficient security, and whether in a suit simply to foreclose or sell, or in suit by him in the double capacity of mortgagee and creditor, against the executor of mortgagor, for sale in the first instance, and then for payment of the deficiency out of the general estate, is entitled to an injunction to prevent the felling of timber; but *quære*, what is an insufficient security? *King* v. *Smith*, 2 H. 239.

PARTNERSHIP.

(*Power of one partner to bind the*

firm.) The implied authority of a partner to bind his co-partners for the repayment of money borrowed for partnership purposes, does not necessarily extend to raising money for the purpose of increasing the fixed capital of the firm; and therefore a party advancing money to one partner, knowing that it was for this purpose, cannot as a matter of course charge the other partners with the loan, unless the transaction took place with their express or actual authority.

Two partners in a firm advertised their intention of adding 16,000*l.* to their capital, by admitting one or more additional partners. W. entered into a negotiation with one of the partners, then acting on behalf of both, on the subject of the announcement, but afterwards declining to enter into the firm, advanced a sum of 4000*l.* to that partner by way of loan, on the security of the bills of the firm, and also of the separate estate of each partner: Held, that W. had so far as this evidence went, notice that the loan of 4000*l.* was an advance, not within the implied authority of the partner obtaining it, the other partner having authorized the capital to be raised in a different mode; but, inasmuch as the original partnership was then existing, and the advance might have been within the scope of the partnership authority, without reference to the proposed increase of capital, liberty was given to W. for the purpose of trying that question, to bring an action on the bill against the executors of the other partner. *Fisher* v. *Tayler*, 2 H. 218.

REHEARING.

(*Mistake as to law.*) Where in a creditor's suit an executor had omitted to go into evidence before the hearing against the debt, supposing that he might do so before the master, but assets being admitted, he could not do so, and a decree for payment was made, and the executor applied for a rehearing on the ground of his mistake in the law, but did not give any evidence of his having been misled, the court refused a rehearing, but allowed the case to stand over for the plaintiff to bring an action, of which the executor was to pay the costs in any event. *Woodgate* v. *Field*, 2 H. 211.

VOLUNTARY DEED.

(*Assignment of stock and shares.*) A father by deed-poll, expressed to be made in consideration of natural love and affection, declared among other things that he transferred and assigned to his daughter, upon trust for her and her children some East India stock and shares in a company, with full power in his name to sue for and recover such part of the property comprised in the deed as a mere assignment would not enable her to recover and receive. The deed was sealed and delivered in the usual way, but was retained in possession of grantor till his death, when it was found inclosed in a paper with an indorsement in his handwriting describing it as "papers concerning Mrs. C. and her children," and directing it to be given up to Mrs. C. at his death, and immediately. Held, that as to the stock and shares, the deed-poll was inoperative. *Dillon* v. *Coppin*, 4 M. & C. 647.

(*Conveyance of freehold — Question at law.*) The validity of a voluntary deed affecting freehold, which the grantor had retained in his possession, was held to be a question of law, which the court refused to decide. *S. C.*

WILL.

(*Construction — Divesting on contingency.*) Held, that a gift of personalty to be divided among certain parties after the death of A., and in case of the death of any of them leaving issue in A.'s lifetime, then such issue to take the parent's share, gave an absolute interest to a legatee dying in A.'s lifetime without issue. *Gray* v. *Garman*, 2. H. 268.

2. (*Construction — Gift of husband and wife.*) The testatrix gave the residue of her real and personal estate equally between her brother, her sister, and her "nephew W., and E. his wife," (E. being the niece of the testatrix.) Held, that the husband and wife took one share each, and not merely one share between them. *Warrington* v. *Warrington*, 2 H. 54.

Notices of New Books.

A Stricture on the Judiciary of Massachusetts, occasioned mainly by articles in the Law Reporter and North American Review. By a Citizen. Andover, printed by Allen, Morrill & Wardwell. 1843. pp. 48.

This pamphlet is too respectable to become popular with the enemies of the judiciary. It is too guarded in its terms to suit those who indulge in unguarded expressions of hostility. It is too restrained in its charges to be considered as a proper exponent of the broad and general censures of violent and unprincipled men. It recommends boldly no sweeping reforms; but suggests one change — "to settle upon twelve or fifteen years as the term of the judicial office." It professes a veneration for the constitution, and a hope that "so much of the laws of the last session as relates to the salaries of the judges of the supreme court will be unanimously repealed."

In the course of his remarks, the author devotes *sixteen* pages to the consideration of what he considers to be an inconsistency in certain opinions of the court. He seems, from the swelling notes of his style, to consider that he has convicted the court of little short of a high crime and misdemeanor. We do not propose to follow him in this discussion. It would be a useless labor; and we should leave the author, probably, as unconvinced of our views, as he has left his readers with regard to his own.

There are many remarks and suggestions in the pamphlet which command our hearty assent. The style and the tone of the discussion show an appreciation of the amenities of life. We do not conjecture the name of the author; but he seems to be a person of a naturally clear intelligence, able to see the right, and disposed to approve it too; not insensible to some of the highest charms that wait on the administration of justice, and not indifferent to learning; but now, by some perverse cross wind, issuing forth from the hollow caves of party, or of personal prejudice, wafted far away from his natural track, and faring on, like Milton's Satan, where there is

> ——— neither sea,
> Nor good dry land.

It would be contrary to the genius of our institutions to object to discussions which are conducted with candor and moderation. They should rather be encouraged. The famous toast of Dundas, the minister associated with the labors and the glories of the younger Pitt, was, "A strong ministry, and a strong opposition." Such a sentiment from the energetic supporter of a monarchy cannot be rejected in a commonwealth like ours. No officers, no magistrates, not even the revered judges of the land, can claim exemption from inquiry, from criticism, from animadversion — if there be occasion for it. Let them be surrounded by the respect of all; but let all be at liberty to express their honest differences of opinion.

The Law of Nisi Prius, Evidence in Civil Actions, and Arbitrations and Awards. By Archibald John Stephens, Barrister at Law. *With Notes and References to the latest American Decisions. By George Sharswood.* In three volumes. Philadelphia: Carey & Hart. Boston: Little & Brown. New York: Gould, Banks, & Co. 1844.

The first thing that strikes us in the appearance of these three noble volumes is the beautiful manner in which they

are "got up." With good, fair paper, a wide margin, and clear type, they compare most favorably with some of the English re-prints which find their way into our immediate community from the southern press; and although our examination has not yet been sufficient to ascertain whether the proof-reader has done his duty, we have no doubt of the fact, as publishers who have shown so much good taste in everything else relating to the external appearance of this work cannot be supposed to have neglected this important point.

The object of the work is to supply the profession with a practical treatise, not only upon the law of Nisi Prius, but also upon the subjects of Evidence in Civil Actions, and Arbitrations and Awards. The immense body of law here presented cannot fail to be acceptable to the profession. It is beyond all question the fullest digest upon these subjects now in print, and the latest English, Irish and American codes are incorporated. We accord most fully with the opinion of Chancellor Kent, expressed in a note to the publishers, which is printed in the third volume: "I have run over the principal articles in the two volumes, and I think the work is ably, judiciously, and, indeed, admirably digested and executed. I do not know a book on Nisi Prius, Law, and Practice equal to it; I am sure it must meet with the universal use and patronage of the profession."

NEW AMERICAN PUBLICATIONS.

Several new legal publications are now in press or in the course of preparation and will soon be issued by Little & Brown, law booksellers, of Boston. Of these a new edition of Vesey Jr's. Chancery Reports, in twenty volumes, may be mentioned as among the most important. We learn, from a circular of the publishers, that they propose to republish an edition of these reports from the last London edition, prepared by the author, assisted by Mr. Beames. The work is to be republished entire, with all the additions of these gentlemen and references to subsequent English and American cases. We have not heard the name of the American editor, but understand that the publishers are in treaty with a gentleman, who, if he will undertake the labor, cannot fail to do himself great credit, and give entire satisfaction to the profession.

The second volume of the American Digest is also in preparation. We learn that Mr. Perkins has withdrawn from the work and that the remaining volumes will be edited by Mr. Theron Metcalf and Mr. George T. Curtis.

W. W. Story, Esq., the reporter of the Circuit Court of the United States for the first circuit, has nearly ready for the press a Treatise on the Law of Contracts. The work is intended primarily for the use of the students of Dane Law College, where it will be used as a text book.

The second volume of American Criminal Trials, by Peleg W. Chandler, is in press. It will contain the principal trials that took place during the revolution, including the proceedings in the case of Major André.

A Law Dictionary adapted to the Constitution and Laws of the United States of America, and of the several States of the American Union: with references to the Civil and other systems of Foreign Law. By *John Bouvier*. Second edition, 2 vols. Philadelphia: T. & J. W. Johnson. 1843.

Precedents of Wills, drawn conformably to the Revised Statutes of the State of New York; with practical Notes; comprising the duty of Executors, Administrators, and Guardians; dedicated by permission to the Hon. James Vanderpool. By *Thomas Taylor*. Two volumes in one. New York: Gould, Banks & Co. 1843.

Reports of Cases argued and decided in the Circuit Court of the United States for the Seventh Circuit. By *John M'Lean, Circuit Judge*. Vol. 2. Columbus: H. W. Derby & H. S. Allen. 1843.

Intelligence and Miscellany.

SUPREME COURT OF THE UNITED STATES.—This high and dignified tribunal is now in session at Washington. The following journal of the proceedings is not without interest, and may be of convenience to many of our readers.

(*Monday*, *January* 8, 1844.) Pursuant to law, the supreme court met this morning in the court-room in the capitol. Present, Hon. Roger B. Taney, chief justice, Hon. John McLean, Hon. James M. Wayne, Hon. John Catron, and Hon. John McKinley, associate justices. On motion of the attorney general, Wm. H. Stewart, Esq., of Maryland, was admitted an attorney and counsellor of this court. The chief justice announced to the bar, that the court would commence the call of the docket to-morrow, under the 36th rule of court.

(*Tuesday*, *January* 9.) Present as yesterday, and Mr. Justice Baldwin and Mr. Justice Daniel. On motion of Mr. Coxe, Seth Barton, Esq., of Louisiana, was admitted an attorney and counsellor of this court. No. 4. Alexander G. McNutt, &c. plaintiffs in error, *v.* Richard J. Bland et al. This cause was argued by General Jones for the plaintiffs in error, and by Mr. Walker for the defendants in error.

(*Wednesday*, *January* 10.) On the opening of the court this morning, Mr. Nelson, the attorney general of the United States, made the following remarks:

"The proceedings of the members of the bar and the officers of this court, held on the 8th inst., have been placed in my hands this morning, with a request that I would communicate them to your honors. They are designed to express the sentiments of profound regret and sorrow with which the recent death of Mr. Justice Thompson has impressed those who have adopted them; to testify their admiration of his ability, integrity, and fidelity as a judge, and of his urbanity, dignity, and virtues as a man. A large portion of the life of the deceased, as your honors are aware, was dedicated to the discharge of the high duties of the bench, of which, for thirty-seven years, he was an honorable incumbent. As early as April, 1802, he took his seat in the supreme court of his native state, by the side of Lewis, and Kent, and Radcliffe, and Livingston; and when, in 1814, chief justice Kent was transferred to the court of chancery, Justice Thompson was called to preside over the deliberations of a tribunal whose reputation is familiar to every American lawyer, and whose decisions, reported by Mr. Johnson, have largely contributed to lay, deep and broad, the foundations of American jurisprudence. From this sphere of eminent usefulness he was withdrawn in 1819, when, by the invitation of Mr. Monroe, then president of the United States, he assumed the direction of the department of the navy, whence, in 1823, he was translated to this court. From that time to the period of his death, full twenty years, he laboriously fulfilled all the obligations of his elevated station, which it is no exaggeration to say he illustrated and adorned—distinguished as he was 'for everything that can give a title to reverence.' Of the assiduity, the patience, the energy, and singleness of purpose with which he discharged his arduous duties here, it does not become me to speak in this presence. Of all these your honors are the witnesses; whilst of his genius, his attainments, and his intellectual vigor, the recorded judgments of this tribunal, during the

whole period of his distinguished service, furnish the imperishable attestation. A just appreciation of his qualifications and high claims, by those who have enjoyed the best opportunity of estimating their extent and magnitude, has dictated the tribute of his worth, embodied in the resolutions which I have now the honor to present to the court, and respectfully move that they be entered upon the minutes of its proceedings."

"At a meeting of the members of the bar of the supreme court of the United States, and of the officers of the court, at the court room, in the capitol, on the 8th day of January, A. D. 1844, the Hon. Daniel Webster was appointed chairman, and the Hon. Silas Wright, secretary. Gen. Walter Jones, David B. Ogden, and John Sergeant, Esqs. were appointed a committee to prepare resolutions expressive of the sentiments and feelings of the meeting on the melancholy event of the recent death of the Hon. Smith Thompson, one of the associate justices of the supreme court of the United States. Whereupon Gen. Walter Jones, on behalf of the committee so appointed, presented the following preamble and resolutions, which were unanimously adopted by the meeting:

"The members of the bar, and officers of the supreme court of the United States, having assembled to give a public and sincere testimony of their sense of the loss which they, in common with this court and the country, have sustained by the death of Smith Thompson, one of the associate justices of the court; and a public expression of their affectionate reverence for the memory of a citizen distinguished in the grateful respect of his country for long-continued, zealous, and eminently useful services in the important stations, both judicial and executive, to which the general confidence in his ability and spotless integrity had called him, and endeared to the affections of his friends, no less by his private than his public virtues—by the admirable qualities of his heart than of his mind: this meeting being so assembled under the influence of an all-pervading sentiment, whilst conscious how inadequately that sentiment can be expressed by any outward token of respect now in their power to manifest, have adopted the following resolutions: (1.) That the members of this meeting wear the customary badge of mourning during the present term of the court. (2.) That the chairman and secretary communicate a copy of these proceedings to the family of the deceased, accompanied by assurances of the condolence of the members of this meeting, in the heavy affliction with which they have been visited. (3.) That the attorney-general be requested, in behalf of this meeting, to present these proceedings to the supreme court in session, and respectfully to ask that they may be entered on the minutes of the court."

To which Mr. chief justice Taney replied as follows: "The court are sensible of what must be the feelings of the bar upon the loss of a judge so distinguished as the late judge Thompson, who possessed in an eminent degree every quality necessary to fit him for a high judicial station, and who, for twenty years, was one of the brightest ornaments of this bench. His death is most painfully felt by the members of the court; for he was not only their respected and honored associate in the discharge of their official duties, but he was beloved as their friend, and endeared to every one of them by his frankness, his kindness, and his untainted honor. We deeply deplore his loss, and direct the proceedings of the bar and the court to be entered on the record, as an enduring testimony of our respect and affection for him."

No. 9. William M. Gwin, plaintiff in error, *v.* James W. Breedlove. This cause was argued by Mr. Walker for the plaintiff in error, and Mr. Clement Cox for the defendant in error.

(*Thursday*, *January* 11.) On the opening of the court, this morning, Mr. Nelson, the attorney-general of the United States, addressed the court as follows:

"My brethren of the bar and the officers of this court have devolved on me the melancholy duty of presenting a series of resolutions, adopted by them yesturday, in relation to Hugh Swinton Legaré, late attorney-general of the United States. The death of this accomplished jurist, statesman and scholar, as your honors are aware, produced at the time of its occurrence an almost unprecedented sensation. In every portion of the confederacy, the evidences of the

public grief were multiplied and signal. Under the pressure of the general distress the voice of sorrow was heard from every rank; and even the stern prejudice of partisanship, under its softening influence, was subdued. Tributes of praise and of eulogy to his memory and character were freely offered by the gifted in letters, the illustrious in eloquence, and the eminently profound in the knowledge of the constitution and laws. I need not say to your honors that the subject of these commendations was meritorious of all that was uttered in his praise. It was meet that one, whose claims upon the admiration and affections of his countrymen were so various, dying in the nation's service, should be followed to the tomb by the nation's tears. The American bar was not insensible to the loss sustained by the proud profession of which the deceased was so distinguished an ornament. Its members, everywhere, largely participated in the general grief; and those of them now assembled, with whom, during the latter period of his professional career, he was brought into more immediate association, have deemed it to be peculiarly appropriate, *at this time and here*, before this august tribunal, at whose pure shrine he so successfully ministered whilst living, to speak his praise; *here*, where, by the extent of his diversified attainments, the richness of his rare eloquence, and the cogency of his vigorous reasoning, he laid the foundation of his most enviable fame; and where, had it pleased an all-wise Providence longer to have spared him, he was destined to have won a more wide-spread, enduring, and imperishable renown. I respectfully move that your honors will order the resolutions to be entered on the minutes of your proceedings.

At a meeting of the members of the bar and the officers of the supreme court of the United States, at the court room in the capitol, on the 8th day of January, 1844, to give expression to their feelings on the melancholy event of the death of Hugh S. Legare, late attorney-general of the United States, the Hon. Daniel Webster was called to the chair, and the Hon. Silas Wright appointed secretary. The following resolutions were submitted by Reverdy Johnson, Esq. and unanimously adopted:

"*Resolved*, That the members of this bar and the officers of this court, feel with deep sensibility the loss which the country and the profession have sustained by the death of the Hon. Hugh Swinton Legare, late attorney general of the United States.

"*Resolved*, That in testimony of these sentiments and feelings, we will wear the usual badge of mourning during the term of the court.

"*Resolved*, That we cherish the highest respect for the professional attainments of the deceased, for his varied talents and accomplishments, for the purity and uprightness of his life, and for the estimable qualities which belonged to him as a man.

Resolved, That the chairman and secretary transmit a copy of these proceedings to the family of the deceased, and assure them of our sincere condolence on account of the great loss they have sustained.

"*Resolved*, That the attorney-general be requested to move the court that these resolutions be entered on the minutes of their proceedings.

To which Mr. chief justice Taney replied as follows: "The court unite with the bar in sincerely lamenting the death of Mr. Legare. Although he was but a short time the attorney-general of the United States, yet he was long enough in that office to win the respect, the confidence, and the friendship of the court; for his mind was richly stored with professional learning, and he came to the argument of every case fully prepared, presenting it in the fewest possible words, and with the candor and frankness which became his official station. The loss of such a man, in the prime of his life, is a public misfortune, and we most cordially unite with the bar in paying respect to his memory. The court therefore direct these proceedings to be entered on the record."

No. 11. David Shriver, plaintiff in error, *v.* M. A. Lynn et al. The argument of this cause was commenced by Mr. Johnson for the plaintiff in error, and continued by Mr. Schley for the defendants in error.

(*Monday*, *January* 15.) No. 16. William R. Hanson et al., plaintiffs in error, *v.* John H. Eustace. The argument in this cause was continued by Mr. Hubbell, for the plaintiffs in error.

(*Tuesday*, *January* 16.) No. 16. William R. Hanson et al., plaintiffs in

error, *v.* John H. Eustace. The argument of this cause was continued by Mr. Hubbell for the plaintiffs in error, and by Mr. Guillon for the defendant in error.

(*Wednesday*, *January* 17.) On motion of Gen. Howard, William Smith, Esq., of Virginia, was admitted an attorney and counsellor of this court. No. 16. William R. Hanson et al. plaintiffs in error, *v.* John H. Eustace. The argument of this cause was continued by Messrs. Guillon and Fallon for the defendant in error.

(*Thursday*, *January* 18.) No. 16. William R. Hanson et al., plaintiffs in error, *v.* John H. Eustace. The argument of this cause was continued by Mr. Fallon for the defendant in error.

BAR ORATORY. — It is sometimes urged upon young practitioners, to avoid every appearance of prolixity in their addresses to the jury; and the example of the late chief justice Parsons and his cotemporaries, who rarely spoke more than an hour in any case, is often cited on this point. But the practice of great lawyers, under a system of special pleading, where there was often but a single issue to be tried, is hardly applicable to causes tried at the present day, upon the general issue. It is very well to talk about the propriety of short arguments, and they are doubtless more agreeable to the court, who easily understand and appreciate the points, and to the bar, who are impatiently waiting for their turn; but we believe the long talkers, other things being equal, are, in general, the most successful with the jury. The truth is, jurors are not always men of the highest intelligence, or the keenest perceptions, and we have known many a lawyer of dull mediocrity, *bore* out a verdict, by a patient and tedious exposition of his points, going over the ground again and again, while his more brilliant opponent, whose short and pertinent argument is appreciated by the bench, the bar, and it may be, the audience, receives much more credit, but is the occasion of loss to his client. Of course there is need of great tact in all this. Every word spoken after the jury are with the advocate, is worse than useless. To ascertain when they are so, is one of the highest arts of the lawyer. The length of time usually taken for the examination of witnesses, in American courts, is altogether a mistake. It generally results from a lack of preparation of the cause for trial. It is very seldom that our lawyers *write down*, before the trial, their questions even for their own witnesses, but trust entirely to the moment, for the most important part of the management of their causes. A very few questions, *well-reasoned* and *properly put*, are sufficient in almost all causes. Even the stubborn witness of an opponent may be thoroughly exposed by a very few questions, *well-directed*. Witness the practice of Lord Abinger, while at the bar, in the cases which have been reported at length; and the practice of all the most celebrated English barristers may be referred to on the same point.

It is undoubtedly true, that one cause of the length of American trials, results from the immediate contact between the client and the barrister, and thus, much more is said and done by the latter, to satisfy his client, than even he thinks desirable. We are here reminded of the amusing reply of an attorney in Massachusetts, to a nervous client, who was not satisfied with his management. His client had come several miles to the place of trial, with a host of witnesses, and was eager for the battle. Before the cause was called, a demurrer was put in, and the plaintiff's attorney informed his client, that he might go home with his witnesses, as there would be no trial. The latter was very much dissatisfied; he had come many miles; he had been at great expense; he had paid all his witnesses, and now he wished to use them; they must earn their money. To all this the attorney gave him no satisfaction; and he soon came to him again. "Squire," said he, "*how* is my case decided? *What has become of it?*" "Why," my dear sir, "it has been DEMURRED." The client puzzled over this for an hour, and, finally, concluding it was beyond his depth, informed his witnesses that they might go home: but just before they departed, he called his attorney out of court, and the following conversation ensued. "Squire, WHAT IS A DEMURRER?" "My good fellow," was the reply of the attorney, patting him on the shoulder, "God never intended that you should understand what a demurrer is. Go home, and see your wife and children."

There is also a good story told of an eminent English barrister. When a

young man, he was retained to defend a prisoner on a heavy charge, of which he was unquestionably guilty. The young barrister concluded, after a patient examination of the case, that his only safety was in caution. He accordingly asked the witnesses no questions and took no points, observing that some facts were not very fully brought out, and that the jury seemed doubtful. To the astonishment of the prisoner he was acquitted. The next morning he called on the barrister and demanded back the retainer fee, on the ground that the barrister did nothing whatever at the trial.

One more anecdote, which we find in an English print. A quondam leader on the western circuit, a most ungrammatical and tautologous speaker, was remarkable for his success with common juries. This was entirely owing to his admirable tact, one secret of which was thus explained by himself. The writer of this chanced to be in a room with him the day after he had been engaged in a cause of considerable interest in the neighborhood, he had been more than ordinarily tautologous, and a hint to that effect was given him. He instantly pleaded guilty to the charge. "I certainly was confounded long," said he; "but did you observe the foreman, a heavy looking fellow, in a yellow waistcoat? No more than one idea could ever stay in his thick head at a time, and I resolved that mine should be that one; so I hammered on till I saw by his eye that he had got it. Do you think I care a rush for what you young critics might say!"

Law of Evidence. — We have heretofore alluded to Lord Denman's Act for improving the Law of Evidence. It has since gone into operation, and is justly regarded as one of the greatest innovations of the day. It provides, "that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer or person having, by law or by consent of parties, authority to hear, receive and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question or inquiry, or of the suit, action or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence: provided, that this act shall not render competent any party to any suit, action or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively: provided also, that this act shall not repeal any provision in a certain act passed in the session of parliament holden in the seventh year of the reign of his late majesty, and in the first year of the reign of her present majesty, intituled, 'an act for the amendment of the laws with respect to wills:' provided, that in courts of equity any defendant to any cause pending in any such court may be examined as a witness on the behalf of the plaintiff, or of any co-defendant in any such cause, saving just exceptions; and that any interest which such defendant so to be examined may have in the matters or any of the matters in question in the cause shall not be deemed a just exception to the testimony of such defendant, but shall only be considered as affecting or tending to affect the credit of such defendant as a witness."

"This," says lord Brougham, "is certainly the greatest measure that has been carried under the head of Judicial Procedure since the Statute of Frauds, that is, since the Restoration. It places the Law of Evidence at length upon a rational footing, and makes its provisions consistent with themselves. It protects judges, and juries, and parties from the miscarriages heretofore constantly produced by the exclusion of important testimony; wisely opening the door to the witness, but reserving the estimate of

his credit and the value of his evidence to those who are to judge the cause. It also sweeps away the numberless nice and subtle distinctions in which the profession was wont to luxuriate, disencumbers our jurisprudence of a heavy load of useless decisions, resting upon refinements and not principles, and abridges the trial of causes by shutting out those debates that used daily to arise upon the admission of proofs, which the common sense of mankind at once pronounced should be received, and law itself did receive in other instances, not distinguishable by the naked eye of plain reason. There have been few greater improvements in our judicial system than those which are effected by this valuable statute."

Bankruptcy and Attachments.—A highly respectable member of the New Hampshire bar, under the date of Jan. 14th, writes us as follows: I take the liberty to communicate to you a decision, which has just been made by our superior court, touching one of those controverted points, of which the late bankrupt act—peace to its ashes—has been so prolific. On the late circuit, the superior court of our state has decided, that an attachment, *bona fide*, made previous to the filing of a petition in bankruptcy, is a lien, valid, by the laws of the state of New Hampshire, and not affected by the bankrupt act. The case upon which the decision was made, was between Jonathan Kittredge, plaintiff, and Isaac Warren, defendant, and was substantially this:—Kittredge sued out a writ against Warren, returnable to the September term of the court of common pleas, for Grafton county, A. D., 1842, upon which was attached personal property of the defendant. After this, Warren filed his petition to be declared a bankrupt, and after due proceedings in the district court for the district of New Hampshire, received his discharge. The suit in the state court was pending, when Warren received his discharge in bankruptcy, and the discharge obtained, *puis darrein* continuance was pleaded in bar of the farther prosecution of the suit. To this plea, the plaintiff replied, that previous to the filing of the bankrupt's petition, he, *bona fide*, made an attachment of the defendant's property, averring that said attachment was a lien, valid by the laws of New Hampshire, and not affected by the bankrupt act, and prayed for judgment "*in rem*," against the property attached. To this replication, the defendant demurred, and the plaintiff joined in the demurrer. The court, in giving their opinion, which, by the way, was a unanimous one, say, that whatever an attachment may be in other states, Massachusetts for instance, in New Hampshire, *an attachment is a lien, recognised* as such by the statutes of the state, and by the judiciary of the state, and since the formation of the constitution. They expressed a regret, that the decision, which they were compelled to make, should be in apparent conflict with high authority, but said, that the doctrine that *an attachment was a lien in New Hampshire*, was, in the opinion of the court, undoubted law, and till within a few months had never been questioned, certainly never controverted. This case has been before them since February last, and has been well-considered. It was argued by *Duncan* for the defendant, and by *Kittredge*, *pro se*.

Statute Laws.—Mr. Justice Story recently remarked on the bench, that the most difficult questions which he ever had to pass upon, were those arising under the legislation of Massachusetts. He was ready to adopt the sentiment of Lord Coke, that when he was asked a question upon the common law, he was ashamed if he could not answer it, but when asked a question upon the statute law, he was ashamed if he could answer it. This saying has the authority of other names also. A sentence from Lord Bacon expresses the same idea. "It was the principal reason, or oracle of Lycurgus, that none of his laws should be written. *Customs* are laws written in living tables, and some traditions the church doth not disauthorize. In all services they are the soundest, and keep close to particulars; and sure I am, there are more doubts that rise upon our statutes, which are a text law, than upon the common law, which is no text law." These are the words of Lord Bacon, in his remarkable paper, the Proposal for amending the Laws of England. A similar idea was expressed by Lord Coke. In the quaint prefaces to his second, third and fifth reports, he asserts that he never knew two questions arise merely upon the common law; but that they were *mostly owing*

to statutes, ill-penned and overladen with provisions. A saying of his is handed down, which is in conformity with the prefaces to his reports. "If it be common law," said Coke to a question, "I should be ashamed if I could not give you a ready answer; but if it be statute law, I should be equally ashamed if I answered you immediately." (Woolrych's Life of Coke, 197.) Mr. Justice Story, in his Inaugural Discourse, has given circulation to this strong opinion, which he attributes to Lord Coke. But, we believe, the opinion has the authority of another great lawyer, Lord Thurlow, who once employed the language attributed to Lord Coke, adding, as was his custom, words not proper in the mouth of any other judge than Minos and his associates.

Admission to the United States Courts.—In lieu of the former rules respecting the admission of attorneys and counsellors in the circuit court, for the first circuit, the following have been recently adopted. (1.) Persons of good moral character, who have studied law in the office of an attorney or counsellor of the supreme court of the United States, or of any circuit or district court of the United States, or of the highest court of a state or territory, for three years before their application for admission, and shall, if required, submit to, and satisfactorily pass an examination, in order to ascertain their qualifications, shall be admitted as attorneys and counsellors of this court. (2.) Persons of good moral character, who have studied law three years, as aforesaid, and have been admitted to practise in the supreme court of the United States, or of any circuit or district court of the United States, or of the highest court of any state or territory, shall be admitted as attorneys and counsellors of this court, without any such examination. (3.) Persons of good moral character, who have studied law two years in the office of such attorney or counsellor at law, and shall have been admitted to practise in the highest court of any state or territory, for one year prior to their application for admission, shall be admitted as attorneys and counsellors of this court.

Bankruptcy in Connecticut. — Proceedings under the Bankrupt Law of 1841, in Connecticut, have been brought to a close, with some few exceptions. The clerk of the district court has been directed to prepare for publication, a statement embracing the whole number of cases — the amount of indebtedness in each case, together with the *final* result. The work has been so far completed, that the following may be deemed nearly correct. There are, however, a few cases still pending in the circuit court, and a few in the district court remain undecided also. There are some, where the indebtedness has not been ascertained.

The whole number of cases presented is 1537. Of these, 1517 were voluntary cases; and 20 compulsory: Disposed of as follows,

Withdrawn	8
Rejected	7
Abandoned	7
Now pending in the circuit court, undecided	6
Postponed for cause, in the district court, about	20
Involuntary cases, where there has been no application for a discharge	19
	57
Discharges decreed	1480
	1537

Aggregate amount of debts in 1368 cases	$10,218,581
The remaining 169 cases, where the amount of the debts has not been ascertained, may be estimated, on an average with those already ascertained.	
That estimate would be	1,262,431
Aggregate amount	$11,481,012

Eleven million four hundred eighty-one thousand and twelve dollars.

The lowest debt of any one applicant, is that set forth in the list, of James Gay of Killingly, $118.

There are 219 cases, where the debts in each case amount to less than $500.

In 161 cases, the debts *in each* case, amount to more than $10.000.

The highest amount of debts in any one case is that of William H. Jessup, of Westport. His list is $1,043,484.

The next highest is that of Maurice Wakeman, of Fairfield, $577,706.

The third on the list is Charles F. Chase, of New Haven, $524,930.

The fourth is that of Thomas Darling, of New Haven, $438,681.

Hotch-Pot.

It seemeth that this word *hotch-pot*, is in English a pudding; for in this pudding is not commonly put one thing alone, but one thing with other things together. – *Littleton*, § 267, 176 a.

The reports of the several officers connected with the Massachusetts State Prison, have been submitted to the Legislature. The largest number of convicts at any one time during the past year, was two hundred and eighty-nine; the smallest number was two hundred and sixty-two. There are nineteen negroes and eighteen mulattoes in the prison. The expenditures have exceeded the income, during the last year, by $5022,11. The reason of this deficit is traced to two causes — a much smaller number of convicts than usual, and a great reduction in the price of wrought granite. When the number is much below the average, as it has been the past year, a deficit is likely to occur. The cost of keeping two hundred convicts is the same as for three hundred, except for merely food and clothing, which are but one item, and that not the largest, in the whole expense. The funds of the prison have become very much embarrassed by a failure in New Orleans, in 1838, and by the failure of the Phœnix bank. Merchants in New Orleans, held in their hands, as agents of the prison, at the time of their failure, $31,104 02, the whole of which is a total loss. There were deposited in the Phœnix bank, at the time of its failure, the sum of $12,635 30, which is yet wholly unavailable. There are four convicts in the prison, wholly or partially deranged, and consequently very unsafe persons to be at large in the prison yard. No suitable accommodations are provided for insane persons in the prison. The only thing that can be done is to shut them up in solitary cells. One man has been confined, in this way, constantly, for seven years, and two others for shorter periods of time.

Lord chancellor Thurlow held lord Alvanley in great contempt, and when the latter was master of the rolls, took every opportunity to express this feeling. When a messenger once went to the chancellor with his honor's respects, and regrets that he was too ill to sit at the rolls, the superior judge demanded in a voice of thunder, "what ails him?" "Please your lordship, he is laid up with the English cholera." "Let him take an act of parliament," — reiterated the chancellor, with one of those amiable wishes for his organs of vision, in which he was in the habit of indulging, — "Let him swallow that, there is nothing so binding."

The Irish papers publish a correspondence between the attorneys for Mr. O'Connell and his fellow defendants, and Mr. Napier the eminent counsel, whose retention is a subject of dispute between the opposing parties. The attorneys say that he was retained by them, as they left a retainer at his house in town while he was in the country. On the other hand, he says that he personally received the application of the crown solicitor before he heard of theirs, and therefore conceives himself bound to abide by the side from whom he first had notice.

"The cry is still they come." Since our last publication, we have received the first number of another new law magazine — The South-western Law Journal and Reporter, published at Nashville, and edited by Milton A. Haynes, Esq. This journal comes well recommended, and we do not doubt that it will receive warm encouragement from the bar, especially in the south-west. If the future numbers are as well prepared as the one we have examined, the work will not merely receive success — it will *deserve* it; and herein is a distinction.

We have seen, in the New York papers, notices of a new law journal, called the Themis.

In a recent trial before the court of common pleas in New York city, the jury sealed up their verdict and separated. On the verdict being read the next morning two jurors dissented and it subsequently came out that one of them had been "talked to," by one of the parties until he changed his mind. The attorney appeared to have advised this course. Judge Ingraham administered a sharp rebuke, to all concerned and took time to consult with his brethren as to what other measures should be taken.

Mr. Barnard Gregory, editor of the London Satirist, was recently brought up for judgment, under an indictment to which he pleaded guilty, for libels on the duke of Brunswick, and the duke's solicitor, Mr. Vallance. Mr. Gregory was sentenced to four months' imprisonment for the libel on the duke of Brunswick, and to twice that period for the other libel, as being more heinous in its nature and calculated to ruin Mr. Vallance in his profession.

An important decision is said to have been recently made by the supreme court of Illinois. The county clerk and sheriff of Madison county, Illinois, demanded fees of the county in a criminal

case where the defendant was unable to pay, and the county commissioners refused payment. A case was made up and submitted by agreement to the supreme court, which decided in favor of Madison county.

We find, in the Kennebec Journal, published at Augusta, Maine, the following advertisement: "Gilbert H. O'Reilly, tailor and draper and counsellor at law. Office opposite the Granite Bank, Water street." This is under the new law of Maine, admitting all citizens of good moral character to practise as attorneys. It is said to take nine tailors to make one man, but in Maine it requires only one to make a lawyer.

Erskine was once counsel for the defendant, in an action against a stable keeper for not taking proper care of a horse. "The horse," said the counsel who led for the plaintiff, "was turned into a stable, with nothing to eat but musty hay in the rack. To such feeding the horse demurred." — "He should have gone to the country," retorted Erskine.

The last number of the North American Review contains a most able article on the state debts, by Benjamin R. Curtis, Esq., of Boston; also a scholarlike and beautifully written review of Prescott's conquest of Mexico, by George S. Hillard, Esq., of Boston.

The Boston Almanac for 1844, gives the names and location of two hundred and twenty-nine lawyers in Boston. Some of the newspapers state the number at two hundred and sixty. Probably there will be that number before the end of the year, if there is not now.

Five men are under sentence of death at Liverpool for shooting a gamekeeper in the service of the earl of Derby, while poaching, and a woman for poisoning her child at Manchester.

Obituary Notices.

Died, in Cheltingham, England, recently, CHARLES BARTON, Esq., aged 75. He was the author of several learned works on the law of *Conveyancing*, and of the little book entitled "The History of a Suit in Equity," in which the essential elements of a bill are explained with great simplicity and clearness.

In New Bedford, Massachusetts, on 28th December last, of hemorrhage at the lungs, EZRA BASSETT, Esq., counsellor at law, aged 43. We copy the following notice of Mr. Bassett from the New Bedford Register: The decease of Ezra Bassett, Esq., has already been announced in our columns; but we cannot permit the grave to close over one with whom we have been, for years, on terms of daily intercourse, without offering a passing tribute, however unworthy, to his memory. Mr. Bassett was a native of the town of Rochester, where the earlier years of his life were spent. The means of his father did not allow him the benefit of a collegiate education; but by his own exertions, he made himself familiar with all the more useful elements of knowledge, and at length entered the office of his brother, Anselem Bassett, Esq., now of Taunton, as a student of law, where he remained until admitted to the bar, at which he has since been a very successful practitioner. Though not gifted with the peculiar talents of an advocate, he yet possessed that discrimination, penetration, perseverance, and acquaintance with the principles of his profession, which enabled him to unfold the most difficult matters and present them clearly to the tribunals. Never was counsellor more faithful to his clients, and none, perhaps, ever enjoyed a larger share of the confidence of those whose rights and interests were intrusted to his care. But aside from his profession, Mr. Bassett had many and stronger claims upon the good feeling and friendship of those who knew him. As a member of the community, he was a good and useful citizen, and exemplary in all the walks of life. A friend — he was frank and faithful, and the young, especially those who had none to aid them, always found him generous and devoted to their welfare. We might, were it proper, mention many instances in which this trait of his character shone out with peculiar lustre and beauty, for there are those in our midst from whose hearts the remembrance of his kindness will not soon pass away. As a husband and a father, none could be more affectionate and watchful of the happiness and well-being of those who made up his household. In other relations, his loss will be deeply felt; but it is here, at home, in the immediate circle of his bereaved ones, that it will be irreparable.